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FILED

No. 00-____ 001248 FEB 1 - 2001

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IN THE

Supreme Court of the United States

BRETT K. LURIE,

Petitioner,

—against—

BONNIE G. WITTNER, Acting Justice of the Supreme Court of the State of New York; ELIOT SPITZER, Attorney General of the State of New York; GLENN S. GOORD, Commissioner, New York State Department of Correctional Services,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MARK M. BAKER
BRAFMAN & ROSS, P.C.
Attorneys for Petitioner
Brett K. Lurie
767 Third Avenue, 26th Floor
New York, New York 10017
(212) 750-7800

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Questions Presented

1. Should the due process-based Rule of Lenity apply to a statute which, though not formally charged, nevertheless serves as the sole basis for the prosecutorial theory and, hence, the only provision which the trial jury determines to have been violated.

2. May a criminal court, consistent with due process and Supreme Court precedents, compel a defendant to forfeit his Fifth Amendment right, and thereby testify that he in fact followed an attorney's advice, as a condition precedent to the exercising of his Sixth Amendment right to call the attorney as a witness on the issue of intent to defraud?

Parties to the Proceedings Below

The Parties to the Proceedings below were Brett K. Lurie, Petitioner, and Bonnie G. Wittner, Acting Justice of the Supreme Court of the State of New York; Eliot Spitzer, Attorney General of the State of New York; and Glenn S. Goord, Commissioner, New York State Department of Correctional Services, Respondents.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 2000

BRETT K. LURIE,

Petitioner,

-against-

BONNIE G. WITTNER, Acting Justice of the Supreme Court of the State of New York; ELLIOT SPITZER, Attorney General of the State of New York; GLENN S. GOORD, Commissioner, New York State Department of Correctional Services,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Brett K. Lurie seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Jurisdiction and Opinions Below

The judgment and opinion of the United States Court of Appeals for the Second Circuit was entered on September 27, 2000 (Appendix A), and is reported at 228 F.3d 113. A

subsequent order denying a timely petition for panel reconsideration was entered on November 6, 2000 (Appendix B).

The unpublished decision and order of the United States District Court for the Southern District of New York (Scheindlin, J.), entered on April 26, 1999, can be located at 1999 WL 246809 (Appendix C), and the decision and order upon reconsideration, entered on July 2, 1999, is reported at 75 F.Supp 2d 117 (Appendix D).

The Supreme Court has jurisdiction to entertain this petition for a writ of certiorari pursuant to 28 U.S.C. §1257(3) and Rule 13 of the Rules of the Supreme Court. The original basis for jurisdiction in the United States District Court was a petition for a writ of *habeas corpus* brought pursuant to 28 U.S.C. §2254, and the basis for jurisdiction in the United States Court of Appeals was 28 U.S.C. §2253(c) and Fed. R. App. P. 22(b).

Statute Involved
New York General Business Law §352-e(2)
"Real Estate syndication offerings"

Unless otherwise provided by regulation issued by the attorney general, the offering statement or statements or prospectus required in subdivision one of this section shall be filed with the department of law at its office in the city of New York, prior to the public offering of the security involved. No offer, advertisement or sale of such securities shall be made in or from the state of New York until the attorney general has issued to the issuer or other offerer a letter stating that the offering has been filed. The attorney general, not later than thirty days after the submission of such filing, shall issue such a letter or, in the alternative, a notification in writing indicating deficiencies in the offering statement, statements or prospectus;

provided, however, that in the case of a building or group of buildings to be converted to cooperative or condominium ownership which is occupied in whole or in part for residential purposes, such letter or notification shall be issued in not sooner than four months and not later than six months from the date of submission of such filing. The attorney general may also refuse to issue a letter stating that the offering statement or statements or prospectus has been filed whenever it appears that the offering statement or statements or prospectus does not clearly set forth the specific property or properties to be purchased, leased, mortgaged, or otherwise to be acquired, financed or the subject of specific investment with a substantial portion of the offering proceeds.

Constitutional Provisions Involved

United States Constitution, **Amendment V**, provides in pertinent part:

> No person shall be...deprived of life, liberty, or property without due process of law...

United States Constitution, **Amendment VI,** provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor...

United States Constitution, **Amendment XIV,** provides in pertinent part:

> No state shall...deprive any person of life, liberty, or property, without due process of law...

Statement of the Case

A. The Indictment

During the late 1980s and 1990, Petitioner Brett Lurie and his closely held corporation, B.K.L. Management, Inc., had been in the business of converting, selling and managing cooperative apartments within the city of New York. In 1993, the New York State Attorney General initiated New York County Indictment 292/93 on the theory that Petitioner (and, in some instances, B.K.L. Management) purposely concealed information regarding the dire financial straights under which Petitioner had been operating from April, 1989 to December, 1990. Specifically, the grand jury returned eight counts of Scheme to Defraud in the First Degree (New York Penal Law §190.65[1][b] [McKinney 1999]), eleven counts of Intentional Real Estate Securities Fraud under the Martin Act (New York General Business Law §352-C[5] and [6] [Mckinney Cumulative Pocket Part 2001]), twelve counts of Grand Larceny in the Second and Third Degree (New York Penal Law §§155.35 and 155.40 [Mckinney 1999]), and one count of Offering a False Instrument for Filing in the First Degree (New York Penal Law §175.35 [McKinney 1999]).

The premise underlying the charges, all of which required proof of fraudulent intent, was that Petitioner had failed to make maintenance and mortgage payments, and thereafter concealed such deficiencies from would-be purchasers (the "purchaser counts") and minority shareholders, prior to their making mortgage payments (the "maintenance counts").

B. The Proof at Trial

As the mainstay of the prosecution's case, and over repeated objection regarding the nature and scope of her testimony, Assistant Attorney General Mary DiStephan, an

office colleague of the prosecuting attorney, was allowed to testify as an "expert witness." She instructed the jury as to the Attorney General's understanding of the operative provisions of New York General Business Law §352-e(2), which, in the prosecution's view, regulated the actions of co-op sponsors with respect to those items of information that needed to be disclosed upon their submitting amendments to offering plans. Following protracted colloquies among the attorneys and the trial judge, and contrary to an earlier *in limine* ruling, DiStephan explained, under her view of §352-e(2), that a sponsor of co-op sales must cease selling between the time an amendment to a co-op offering plan is submitted to the Department of Law and when it is later accepted for filing.

That was the entirety of the evidence of fraudulent intent. Thus, the prosecution did not produce a single witness to testify that Petitioner, either personally or through his immunized agents, had ever affirmatively sought to conceal adverse financial information from shareholders and purchasers. To the contrary, except as to one amendment, all other submitted amendments to the original offering plans demonstrated Petitioner's repeated efforts to disclose his financial difficulties. It was the Department of Law, as the evidence showed, which waited lengthy periods of time before filing the submitted amendments and thereafter disseminating them to would-be purchasers and shareholders.

C. The Defense

Defense Counsel sought to demonstrate that, having repeatedly disclosed the precarious state of his finances in the submitted amendments, Petitioner believed that he had fulfilled his obligations of disclosure. It was the defense, therefore, that Petitioner had never intended to be deceptive, let alone to defraud anyone, despite continuing to sell shares and collect maintenance pending the later acceptance for filing of such submitted amendments, contrary to the Prosecution's view of

§352-e(2).

In order to prove Petitioner's good faith in complying with state regulations and shoring up his finances, the Defense, *inter alia*, sought to call Attorney **Richard Koral**. According to the proffer, Koral would have testified as to negotiations he had conducted on Petitioner's behalf with various lenders regarding Petitioner's efforts to save the buildings. The Defense also wanted to show that Petitioner could not have harbored any fraudulent intent, either in his actions or inactions, because he had simply followed Attorney Koral's directions with regard to the filed amendments and his dealing with purchasers and shareholders.

The trial court sustained the Attorney General's objection to the testimony. In fact, the trial court repeatedly precluded Koral from testifying for the Defense unless Petitioner was willing to testify first that he had followed such advice. Strenuous objection was taken to such rulings, which, it was claimed, eviscerated the Defense.

D. The Jury Deliberations

As one of its initial requests in a note signed by its Foreperson, the jury sought to re-hear "testimony of Ms. DiStephan regarding whether or not an apartment can be sold between the period of an amendment submitted and filing and accepting." Also requested by the jury in this note were "contracts and dates of closing" for the various purchasers who testified as victims. In fact, the jury continually requested, *inter alia*, information about dates of closings and the filing of amendments.

E. The Verdict

In conformity with DiStephan's testimony, Petitioner was

convicted of all counts relating to sales that had taken place **after** the offering of amendments, but **before** such amendments -- all containing information relating to Petitioner's financial difficulties -- had been accepted for filing. On the other hand, and as conceded by Respondents in the Petition before the District Court, absent any evidence distinguishing the manner in which he dealt with Purchaser Lyn B. Smith, Petitioner was acquitted of most of the counts involving that particular individual (Counts 14 and 22).

Completely unrelated to any issue of intent, the jury found in that instance alone, in conformity with DiStephan's interpretation of New York General Business law §352-e(2), that the Smith purchase occurred on August 27, 1990 -- 26 days **after** the relevant amendment (which had been offered for filing on April 9, 1990) had been accepted for filing by the Department of Law on August 1, 1990.

F. The Motion to Set Aside the Verdict

In support of an unsuccessful motion to set aside the verdict pursuant to New York Criminal Procedure Law §330.30(1) (McKinney 1994), Petitioner showed, *inter alia*, that according to jury Foreperson Ernestine Gadsen, who later spoke to Counsel, the verdict had been based solely on DiStephan's testimony. Gadsen recalled the jury's finding that Petitioner had acted in a "lackadaisical" manner, "did not follow those guidelines" and "didn't do what was expected of him on the part of the Attorney General of the State," **regardless of any fraudulent intent**, which it never considered. Another issue raised was that the trial judge unconstitutionally precluded the testimony of Attorney Richard Koral.

G. The Sentencing

With respect to the purchaser counts, Petitioner was

sentenced to concurrent terms of imprisonment of one to three years. As to the maintenance counts, Petitioner was also sentenced to concurrent terms of imprisonment of one to three years which the Court ordered to run consecutively to the purchaser counts. Finally, as to Count 28, charging Offering a False Instrument For Filing in the First Degree (New York Penal Law §175.35 [McKinney 1999]), Petitioner was sentenced to one to three years, with that sentence to run concurrently with the sentence on the purchaser counts. In sum, Petitioner faced a cumulative sentence of two to six years' imprisonment.

H. The State Appeals

Following an appeal to the Appellate Division, First Judicial Department (see People v. Lurie, 249 A.D.2d 119, 673 N.Y.S.2d 60 [1st Dept. 1998]), where, in an unchallenged reply brief, Petitioner raised the Rule of Lenity as a violation of due process, that Court effectively found intent to defraud, *per se*, by judicially inserting the words "amendment to the offering plan" into New York General Business Law §352-e(2). With respect to Petitioner's claim that his Sixth Amendment rights had been violated by the preclusion of Attorney Koral, the Appellate Division held that "the [trial] court's ruling that Lurie's own testimony establishing reliance on counsel's advice was a prerequisite to the admission of the attorney's testimony and the proposed defense of reliance on advice of counsel was also proper." A motion to reargue, which again raised the issue of the Rule of Lenity, was also denied, as was a subsequent application for leave to appeal to the New York Court of Appeals (see 92 N.Y.2d 64 [1998]).

I. The Petition for *Habeas Corpus*

On October 29, 1998, Petitioner filed this application for a writ of *habeas corpus* in the Southern District of New York, pursuant to 28 U.S.C. §2254. Among the issues raised by

Petitioner was that the Rule of Lenity, as a component of due process, prevented reliance by the state courts on New York General Business Law §352-e(2). Also claimed was that the preclusion of Richard Koral violated Petitioner's Sixth Amendment and Fourteenth Amendment Due Process Rights.

In its initial Opinion and Order dated April 26, 1999 (Appendix C), the District Court determined that the Rule of Lenity, which issue was found to have been exhausted in the New York courts, precluded a conviction on any of the purchaser counts. The District Court also held that as to both purchaser and maintenance counts, but not as to count 28, the preclusion of Attorney Richard Koral as a defense witness was unconstitutional. It therefore ordered a new trial as to all counts except Count 28.

Both sides moved for reconsideration, with Petitioner maintaining that the same reasoning which impelled the District Court to find that the Koral preclusion vitiated the validity of the purchaser and maintenance counts, likewise rendered Count 28 infirm. In a later opinion and order dated July 1, 1999, thereafter entered on July 8, 1999 (Appendix D), the District Court rejected the arguments advanced by both sides. The Court thereupon reinstated its decision of April 26, 1999, which had been withdrawn on April 30, 1999, pending reconsideration. On its own initiative, the District Court also issued a certificate of appealability. Appendix D, at D17.

Thereafter, in an opinion and judgment dated September 26, 2000 and entered on September 27th, the United States Court of Appeals for the Second Circuit reversed that part of the District Court's judgment which had granted *habeas* relief, and affirmed that part which had denied the application (Appendix A). On November 6, 2000, a petition for rehearing was thereafter denied (Appendix B).

Reasons for Allowance of the Writ

A. The Supreme Court Should Determine Whether the Due Process-based Rule of Lenity Applies to a Statute Which, Though Not Formally Charged, Nevertheless Serves as the Sole Basis for the Prosecutorial Theory And, Hence, the Only Provision Which the Trial Jury Determines to Have Been Violated.

Crucially, in reversing the grant of *habeas corpus* relief in favor of Petitioner, the Court of Appeals did not overturn the District Court's determination that Petitioner had been deprived of due process of law by virtue of a prosecution theorized on a statute which was clearly susceptible to differing interpretations. Indeed, it accepted the premise that "[u]nder the AEDPA standard, Lurie's claim is therefore asserted on the basis of federal law of sufficient clarity and authority." Appendix A, at A22.

Rather, the Second Circuit carved out an exception which it assumed had legitimacy, thereby finding that the violation complained of was neither contrary to, nor amounted to an unreasonable application of settled Supreme Court precedent. Specifically, upon recognizing the "close question" of exhaustion, Appendix A, at A18, and analyzing this Court's recent decision in Williams v. Taylor, 120 S.Ct. 1495 (2000), the Court of Appeals maintained the view that because Petitioner was **not formally charged** with a violation of New York General Business Law §352-e(2), but, instead, with having violated separate statutes relating to schemes to defraud, the unconstitutional ambiguity underlying Section 352-e(2) was insignificant for purposes of 28 U.S.C. §2254(d). See Appendix A, at A27 ("In Williams v. Taylor, the Supreme Court explicitly declined to determine whether an unreasonable refusal to extend a constitutional doctrine is sufficient to warrant federal habeas relief under AEDPA..."). Accordingly, even though it is

undisputed on this record that the jury only found a violation of §352-e(2) before it convicted Petitioner, and, hence, that it never made any determination that Petitioner had in fact violated the other, formally charged statutes, Petitioner was denied the *habeas* relief that the District Court had earlier granted with respect to the "purchaser counts."

The Court of Appeals believed this result was necessary because in all the Supreme Court fair notice cases, the respective defendants, unlike Petitioner in this case, had been specifically charged under the "allegedly ambiguous statute." Thus, upon referencing Supreme Court precedents, the Court of Appeals stated that all such cases "involved the applicability of the fair-notice requirement (sometimes via the Rule of Lenity) to the very statute that defined the charged crime." Appendix A, at 24. The Court ultimately concluded, therefore, that "[t]hat concern in not implicated here. Lurie was charged under statutes proscribing 'fraud' and 'larceny' -- not violation of § 352-e(2)." Appendix A, at A31.

Because the Court of Appeals, in so ruling, has "decided an important question of federal law that has not been, but should be, settled by this Court..," Supreme Court Rules, Rule 10(c), this Court should grant this Petition. Query: if the sole basis for a defendant's conviction is a jury finding that there has been a violation of a specific statutory provision which is unconstitutionally ambiguous pursuant to Supreme Court precedent, then what possible difference exists that the prosecutor, despite relying on proof of that ambiguous enactment, had formally charged another statute? In the final analysis, either way, a criminal conviction is bottomed upon an indisputably unconstitutional statute. Hence, either way, a criminal defendant's rights to fair notice and due process of law are egregiously violated.

This Court should consider whether the Second Circuit's

ruling is compatible with well settled Supreme Court principles. In United States v. Harriss, 347 U.S. 612, 617 (1954), this Court, discussing the constitutional requirement that a criminal statute "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," recognized that "[t]he underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." Harriss, 347 U.S at 617. This result is deeply rooted in constitutional jurisprudence. See, e.g., Kolender v. Lawson, 461 U.S. 352, 357 (1983); Marks v. United States, 430 U.S. 188, 191-92 (1977); Rabe v. Washington, 405 U.S. 313, 315 (1972); Bouie v. City of Columbia, 378 U.S. 347, 351 (1964); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Const. Co., 269 U.S. 385, 391 (1926).

The Rule of Lenity, which was later described "as a sort of 'junior version of the vagueness doctrine,'" United States v. Lanier, 520 U.S. 259, 266 (1997) (quoting H. Packer, The Limits of the Criminal Sanction 95 [1968]), further "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered," 520 U.S. at 266. It is therefore well-embedded in the same federal constitutional principle of fair notice. Indeed, this Court made clear in 1931 that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." McBoyle v. United States, 283 U.S. 25, 27 (1931).

Later, in United States v. Bass, 404 U.S. 336, 347-48 (1971), the Court explained that the principle articulated in McBoyle and the interest in having legislatures, not courts, define criminal activity, form the basis of the longstanding rule that "'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should

have spoken in language that is clear and definite.'" Bass, 404 U.S. at 347 (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221-22 [1952]). The Court has articulated and applied the Rule of Lenity time and again. See, e.g., Hughey v. United States, 495 U.S. 411, 422 (1990); Crandon v. United States, 494 U.S. 152, 160 (1990); Liparota v. United States, 471 U.S. 419, 427 (1985); Rewis v. United States, 401 U.S. 808, 812 (1971).

The Lanier Court also recognized that, along with the vagueness doctrine and the due process prohibition on applying a novel construction of a criminal statute to conduct not clearly within its scope, the Rule of Lenity is but one of "three related manifestations of the fair warning requirement." 520 U.S. at 266. "In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." Id.

The Second Circuit has now carved out an exception to these inviolate principles where the ambiguous statute, though the linchpin of the prosecution's case, is not the provision which was formally charged. *But oftentimes, though not formally charged themselves, the only proof of alleged criminal conduct may be evidence of violations of other regulations and statutes that are inherently ambiguous.* See *e.g.*, United States v. D'Alessio, 822 F. Supp. 1134, 1138 (D.N.J. 1993) (applying Rule of Lenity to uncharged, ambiguous court rule, integral to the actual charges of mail fraud).

That is precisely what was done in this case. Here, the **sole** evidence that Petitioner harbored an intent to defraud was his purported violation of the DiStephan "sales must cease" testimony, which was bottomed on the prosecution's interpretation of an uncharged statute -- *viz.*, New York General Business Law §352-e(2). *The indisputable record attests that instead of proof of the actual fraud statutes charged, that*

provision was central to the prosecution's theory of the case and crucial to the jury's verdict.

In its initial note to the court after beginning deliberations, the jury requested, among other items, the DiStephan "sales must cease" testimony and the contracts and dates of closing for the various purchasers who testified as victims. The jury sent at least two more notes requesting information about closing dates and amendments. Statements made by jury Foreperson Ernestine Gadson following the verdict confirmed that the jury relied almost entirely upon DiStephan in reaching a verdict on the purchaser counts.

As demonstrated in this record, the verdict itself closely mirrored this testimony. The jury convicted Petitioner of all counts that related to sales which had taken place after amendments were offered to the New York Department of Law but before acceptance for filing.

In contrast, the jury acquitted Petitioner of most of the counts relating to Lyn B. Smith, whose purchase had taken place **after** the relevant amendment had been accepted for filing. Indeed, the Attorney General conceded before the District Court that the **timing** of the Smith purchase was the only distinguishing factor from the purchases for which Petitioner was convicted. Hence, as the District Court properly concluded in analyzing the Rule of Lenity issue, there can be no doubt that §352-e(2) -- which a different New York judge had interpreted as actually lacking the requirement ascribed to Petitioner by the trial judge herein (Appendix C, at C12-13) -- provided the sole basis for Petitioner's conviction on the purchaser counts.

Given the centrality of this testimony to Petitioner's conviction, this Court should determine whether the due process-based Rule of Lenity applies even where the unquestionably ambiguous statute is not formally charged.

Hence, the Court should determine whether Petitioner, though not formally charged under §352-e(2), might still be relieved of its unconstitutional impact for purposes of 28 U.S.C. §2254(d). The Court should therefore firmly address whether the test of constitutional error in such instance depends less upon the specific formal charge than upon the materiality of the evidence of the fatally ambiguous statute or regulation to the conviction. *Cf.* United States v. Agurs, 427 U.S. 97, 112-13 (1976),

B. The Supreme Court Should Determine Whether a Criminal Court, Consistent with Due Process and Supreme Court Precedents, May Compel a Defendant to Forfeit His Fifth Amendment Right, and Thereby Testify That He in Fact Followed His Attorney's Advice, as a Condition Precedent to the Exercising of His Sixth Amendment Right to Call the Attorney as a Witness on the Issue of Intent to Defraud

Upon reversing the District Court, the Court of Appeals concluded that the State judge's directive that Petitioner had to sacrifice his Fifth Amendment Right in order to vindicate his Sixth Amendment right to call Attorney Koral was "foundational." Appendix A, at A37. Then, finding that "[m]ore fundamentally, Koral's testimony was immaterial", *id.*, the Court explained:

> [E]ven if Lurie was following advice of counsel in attempting to comply with §352-e(2)'s technical requirements regarding disclosure to the state, that effort would not rebut the overwhelming evidence that Lurie failed to make full and fair disclosure to apartment owners and would-be purchasers.

Id; emphasis in original.

However, as was noted in the petition for rehearing before the Court of Appeals, this conclusion overlooked the undisturbed fact finding by the District Court that Petitioner's proffer had attributed such failure of disclosures to his attorney's advice, **already established in documents admitted by the Prosecution**. The Court of Appeals thus sidestepped the indisputable reality that the testimony of Petitioner was completely unnecessary as a "foundation" to the testimony of Attorney Koral. For, as the District Court noted:

> Lurie arguably would not have to take the stand to prove that he followed his attorney's advice [footnote omitted]. According to Lurie, his filings with the Department of Law, by their very existence, corroborate that he followed his counsel's advice.

Appendix C, at C19.

The District Court thus determined that at a new trial, Petitioner's attorney should be afforded an opportunity to explain that he had advised Petitioner that **all** disclosure obligations would be satisfied upon divulging financial reversals in the necessary filings with the State. As the District Court concluded:

> Petitioner should be allowed, upon retrial, to offer evidence that would negate a finding of fraudulent intent. If calling his attorney as a witness is the only way he can do so, so be it. Objections as to relevancy and hearsay can be made by the prosecution on a question-by-question basis and ruled upon accordingly. To prevent Lurie from doing otherwise constitutes the type of constitutional error that cannot be deemed harmless.

Appendix C, at C20.

Accordingly, based on the record established by the District Court, there is presented in this petition the pure legal question as to whether Petitioner Lurie's testimony could be constitutionally required as a prerequisite to the exercising of his Sixth Amendment right to call his attorney as a witness. There is thus presented the question as to whether the conduct of this state trial was contrary to the constraints of Supreme Court precedent, 28 U.S.C. §2254(d)(1), and hence, whether the Court of Appeals has again "decided an important question of federal law that has not been, but should be, settled by this Court..." Supreme Court Rules, Rule 10(c).

Specifically, arising out of the Due Process Clause of the Fourteenth Amendment, certain procedural guarantees are sacrosanct at criminal trials. For example, the right to present a defense, pursuant to the Sixth Amendment, has been referred to as one of the "minimum essentials of a fair trial." Chambers v. Mississippi, 410 U.S. 284, 294 (1973); see also Washington v. Texas, 388 U.S. 14, 20 (1967).

Part of this Sixth Amendment right is, of course, the right of an accused to call witnesses whose testimony is "material and favorable to his defense." United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982). Of parallel importance is the Fifth Amendment guarantee to a criminal defendant of an unqualified right to choose whether or not to testify at trial. Harris v. New York, 401 U.S. 222, 225 (1971).

These three constitutional requirements provide the foundation of a defendant's case and must, necessarily, coalesce. See Rock v. Arkansas, 483 U.S. 44, 51-53 (1987). It is thus clearly the rule, bottomed on principles of due process and applicable to the states under the Fourteenth Amendment, that "procedures should not require a party to surrender one

constitutional right in order to assert another one." Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1205 (Fed. Cir. 1987) (citing Simmons v. United States, 390 U.S. 377, 394 [1968] [unconstitutional to force a defendant either to forgo a Fourth Amendment claim, or waive his Fifth Amendment privilege against self-incrimination] and Wehling v. Columbia Broadcasting System, 608 F.2d 1084, 1086, 1088 [5th Cir. 1979] ["The Supreme Court has disapproved of procedures which require a party to surrender one constitutional right in order to assert another."]).

This proposition, in one incarnation or another, has been vindicated time and time again by the Supreme Court. See, e.g., New Jersey v. Portash, 440 U.S. 450, 460 (1979) (violation of Fifth Amendment to use criminal defendant's testimony before grand jury under grant of immunity to impeach him in his own trial); Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977) (violation of Fifth Amendment to compel testimony under threat of sanction); Kastigar v. United States, 406 U.S. 441 (1972) (unconstitutional to force defendant to forfeit his Fifth Amendment privilege against self-incrimination, absent guarantee of use and derivative use immunity); Brooks v. Tennessee, 406 U.S. 605, 612-613 (1972) (due process violated by state law that requires a defendant to testify prior to presenting a case; it is an unconstitutional restriction on defendant's Fifth Amendment privilege against self-incrimination).

Based on the record in this case, the Court should now determine, whether, consistent with the interpretation of 28 U.S.C. §2254(d) in Williams v. Taylor, 120 S.Ct. 1495 (2000), such "minimal essentials of a fair trial," as expressed in Supreme Court precedent, are egregiously violated by a court which hinges the vindication of the right to call witnesses by the Defense upon the forfeiture of a defendant's equally sacrosanct right not to testify personally. The Court should thus determine whether, upon such a forced trade-off, federal *habeas corpus*

relief should be available to an aggrieved state defendant.

Conclusion

The Petition for a Writ of Certiorari Should be Granted As To Both Questions Presented.

Dated: **New York, New York**
January 29, 2001

Respectfully submitted,

MARK M. BAKER
BRAFMAN & ROSS, P.C.
Attorneys for Petitioner,
Brett K. Lurie
767 Third Avenue, 26th Floor
New York, New York 10017
(212) 750-7800

Appendix A

(Opinion of United States Court of Appeals)

Appendix A

(Opinion of United States Court of Appeals)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1186, 1449—August Term, 1999

(Argued: February 17, 2000
Decided: September 26, 2000)

Docket Nos. 99-2425, 99-2426

BRETT K. LURIE,

Petitioner-Appellee-Cross-Appellant,

—v.—

BONNIE G. WITTNER, Acting Justice of the Supreme Court of the State of New York; ELIOT SPITZER, Attorney General of the State of New York; GLENN S. GOORD, Commissioner, New York State Department of Correctional Services,

Respondents-Appellants-Cross-Appellees.

Before:

KEARSE, JACOBS, and POOLER,
Circuit Judges.

Appeal and cross-appeal from a judgment of the United States District Court for the Southern District of New York (Scheindlin, *J.*) granting in substantial part petitioner's motion for a writ of habeas corpus.

Affirmed in part and reversed in part.

MARK M. BAKER, New York, N.Y. (Melinda Sarafa, Brafman & Ross, P.C., on the brief), *for Petitioner-Appellee-Cross-Appellant.*

ROBIN A. FORSHAW, New York, N.Y. (Eliot Spitzer, Attorney General of the State of New York, Edward Johnson, Deputy Solicitor General, on the brief), *for Respondents-Appellants-Cross Appellees.*

JACOBS, *Circuit Judge*:

Petitioner Brett K. Lurie, the one-time sponsor and manager of five cooperative apartment buildings, misapplied the tenants' maintenance payments and sold apartment shares without disclosing the cooperative's weakened financial condition, and was convicted in New York State Supreme Court for schemes to defraud, real estate securities fraud, larceny, and offering a false

instrument. Lurie moved in the United States District Court for the Southern District of New York (Scheindlin, *J.*) for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court granted the motion in substantial part on two grounds:

> (i) The state-court jury was presented with an interpretation of a certain relevant but uncharged real estate law that was also subject to a different interpretation. The district court ruled that this constituted a violation of the fair-notice requirement implicit in the rule of lenity, and that such a violation was of constitutional dimensions.
>
> (ii) The state trial court ruled that Lurie could not call his former lawyer as a witness to present an advice-of-counsel defense unless Lurie first laid a testimonial foundation for such a defense. The district court ruled that this constituted an impermissible interference with Lurie's right to present a defense.

Appeal is taken by the Commissioner of the New York State Department of Corrections, the Attorney General of the State of New York, and an Acting Justice of the New York State Supreme Court (collectively, the "State") from so much of the judgment as granted the writ. Lurie cross-appeals on the ground that the preclusion of his attorney's testimony also required vacatur of the only count that the district court left standing.

The State appeals on three grounds: (i) Lurie failed to exhaust his fair-notice claim in state court; (ii) Lurie's fair-notice claim is premised on facts that implicate no constitutional issue reviewable on a petition for federal habeas relief; and (iii) the state court's refusal to permit testimony by Lurie's former lawyer did not deprive

Lurie of his constitutional right to present a defense, and so was not properly subject to federal habeas relief.

For the reasons that follow, we reverse so much of the judgment of the district court as grants Lurie's petition. We affirm the remainder of the judgment.

BACKGROUND

A. *Facts*

In 1989 and 1990, Lurie was the sponsor, manager and majority shareholder of five cooperative apartment buildings in Queens County, New York. Among his wrongful acts as financial officer for the buildings, Lurie failed to make monthly payments on the mortgage; failed to pay for building maintenance, water, heating oil or taxes (with the exception of a $15,000 maintenance payment to himself); wrote checks to himself from the buildings' accounts in the amount of $435,000; ran up debts and obligations to the cooperatives that by October 1990 exceeded $1.8 million; and filed with the state an amendment to a real estate offering plan that contained materially false information.

The state concluded that these acts amounted to a knowing scheme to defraud current apartment owners and potential apartment buyers, and indicted Lurie. One group of violations—referenced as the "maintenance counts"—was based on Lurie's failure to disclose the buildings' parlous condition to minority shareholders, in violation of New York's General Business Law (the "Martin Act") and various sections of New York's Penal Law. These shareholders (*i.e.*, the apartment owners) continued to make maintenance payments presumably in reliance on the reasonable but mistaken belief that their payments were being applied to the upkeep of the buildings and the other corporate obligations of the cooper-

ative. A second group of violations—referenced as the "purchaser counts"—arose from Lurie's failure to disclose the buildings' financial condition to potential buyers and actual purchasers, also in violation of the Martin Act and New York's Penal Law.

B. *State court proceedings*

On April 25, 1996, Lurie was convicted by a jury in the Supreme Court of the State of New York, the Hon. Bonnie G. Wittner, presiding. The relevant particulars of the trial are set forth below, in the context of the legal discussion. The counts of conviction were:

(i) eight counts of conducting a scheme to defraud in the first degree, in violation of N.Y. Penal Law § 190.65(1)(b) (McKinney 1999) (the "scheme-to-defraud counts");

(ii) nine counts of intentional real estate securities fraud, in violation of the Martin Act, N.Y. Gen. Bus. Law § 352-c(5), (6) (McKinney 1996) (the "securities fraud counts");

(iii) three counts of grand larceny in the second degree, in violation of N.Y. Penal Law § 155.40 (McKinney 1999);

(iv) three counts of grand larceny in the third degree, in violation of N.Y. Penal Law § 155.35 (McKinney 1999) (together with the second-degree larceny counts noted above, the "larceny counts"); and

(v) one count of offering a false instrument for filing in the first degree, in violation of N.Y. Penal Law § 175.35 (McKinney 1999) (the "false instrument count").

Each count has a *mens rea* requirement of intent to defraud. *See* N.Y. Gen. Bus. Law § 352-c(5), (6) (prohibiting actions done "with intent to defraud"); N.Y. Penal Law § 155.05(1) (defining "steal[ing]" and "larceny" to require "*intent* to deprive another of property" (emphasis added)); *id.* § 155.35 ("A person is guilty of grand *larceny* . . . when he *steals* property . . . ." (emphasis added)); *id.* § 155.40 (same); *id.* § 175.35 (prohibiting actions done "with intent to defraud"); *id.* § 190.65(1)(b) (same).

The first three scheme-to-defraud counts, as well as the securities fraud counts and the larceny counts, constitute the purchaser counts. Counts 4-8 alleging a scheme to defraud constitute the maintenance counts. The false instrument count is referenced separately.

Lurie was sentenced to two consecutive terms of imprisonment—(i) concurrent terms of one to three years on each of the maintenance counts, and (ii) concurrent terms of one to three years on each of the purchaser and false instrument counts—totaling two to six years.

The Appellate Division affirmed Lurie's conviction and sentence. *See People v. Lurie*, 673 N.Y.S.2d 60, 62-64 (1st Dep't 1998). The Court of Appeals denied leave to appeal on August 27, 1998. *See People v. Lurie*, 680 N.Y.S.2d 64 (1998) (table).

C. *Federal habeas review*

In October 1998 Lurie filed his motion for a writ of habeas corpus, pleading three grounds:

> (i) the state trial court violated due process when it permitted testimony by the head of the New York State Attorney General's Real Estate Finance Bureau concerning the obligations of a sponsor under the New York General Business Law;

(ii) the state trial court violated the rule of lenity by relying on, as evidence of Lurie's state of mind, Lurie's compliance with one possible interpretation of the statute governing those obligations, when the statute was susceptible to a narrower interpretation; and

(iii) the state trial court denied Lurie his constitutional right to present a defense when it refused to allow Lurie's former lawyer to testify about the advice he gave Lurie unless Lurie testified that his actions were influenced by that advice.

The district court heard oral argument on February 17, 1999, and on April 26 granted habeas relief on all counts except the false instrument count. *See Lurie v. Wittner*, No. 98 Civ. 7697, 1999 WL 246809 (S.D.N.Y. Apr. 26, 1999) ("*Lurie I*").

As to the purchaser counts: To show Lurie's intent to defraud, the state offered and the state trial court admitted testimony about certain legal obligations that are owed by a cooperative sponsor under a state statute. On habeas, the district court determined that the statute was susceptible of an alternative reading, under which Lurie's conduct would not have violated the statute, and that the rule of lenity therefore applied and required vacatur of the purchaser-count convictions. *See Lurie I*, 1999 WL 246809, at *5-*7.

As to the maintenance counts: The district court held that the state trial court violated Lurie's Sixth Amendment right to present a defense, because the state trial court's conditional refusal to allow testimony by Lurie's former lawyer presented Lurie with the constitutionally intolerable choice of exercising either his Fifth Amendment privilege against testifying or his Sixth Amendment right to present a defense, but not both. The court

therefore vacated Lurie's maintenance convictions.[1] *See Lurie I*, 1999 WL 246809, at *7-*11. The district court's discussion made no mention of the false instrument count.

In response to competing motions for reconsideration, the district court withdrew its opinion; on July 1, it reinstated the previous opinion and filed a second opinion denying both motions for reconsideration. *See Lurie v. Wittner*, 75 F. Supp.2d 117 (S.D.N.Y. 1999) ("*Lurie II*"). In doing so, the district court ruled that the exclusion of testimony by Lurie's attorney did not require vacatur of the false instrument count, because the "proposed testimony [was] irrelevant to [that count] . . . [and] [t]he exclusion of irrelevant evidence cannot support a violation of petitioner's Sixth Amendment right to present a defense." *Id.* at 120. The court declined to reconsider its ruling on the rule of lenity, its Sixth Amendment ruling, or its implied holding that Lurie had exhausted his state remedies. *See id.* at 121-26.

DISCUSSION

On appeal, the State argues that: (i) Lurie never properly raised his fair-notice claim in the state courts, and that as an unexhausted claim it is an improper ground for federal habeas relief; (ii) on the merits of the fair-notice claim, the district court failed to apply the standards for federal habeas review of state convictions, and thereby recognized a new rule of constitutional law in violation of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989);

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[1] The district court overturned the purchaser-count convictions before it considered the maintenance-count convictions, so it is unclear whether the court believed that the habeas relief warranted by the preclusion of the lawyer's testimony would extend to the purchaser counts as well as the maintenance counts.

and (iii) the state trial court's evidentiary ruling on the testimony of Lurie's attorney was reasonable in light of the Supreme Court's precedent regarding the constitutionally guaranteed right to present a defense.

Lurie cross-appeals on the ground that the state court's refusal to allow his attorney to testify requires vacatur of the false instrument count.

Because Lurie's petition, filed in October 1998, postdates the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered titles of the U.S.C.), AEDPA's revisions of 28 U.S.C. § 2254 govern this proceeding. *See Williams v. Taylor*, 529 U.S. ___, ___, 120 S. Ct. 1495, 1518 (2000) ("Because [petitioner] filed his petition in December 1997, [his] case is governed by the statute as amended by AEDPA."); *cf. Lindh v. Murphy*, 521 U.S. 320, 322-23, 117 S. Ct. 2059, 2061 (1997); *Tankleff v. Senkowski*, 135 F.3d 235, 242 (2d Cir. 1998) (holding that pre-AEDPA standards govern petitions filed prior to AEDPA's enactment).

This Court has jurisdiction to hear the State's appeal and Lurie's cross-appeal under 28 U.S.C. § 2253(a). No certificate of appealability is necessary for the State to appeal the grant of habeas corpus relief. *See* Fed. R. App. P. 22(b)(3); *Malchi v. Thaler*, 211 F.3d 953, 956 (5th Cir. 2000); *cf. Garcia v. Lewis*, 188 F.3d 71, 76 n.2 (2d Cir. 1999) (dictum). The district court granted Lurie a certificate of appealability for the cross-appeal. *See* 28 U.S.C. § 2253(c)(1)(A); Fed. R. App. P. § 22(b)(1); *Lozada v. United States*, 107 F.3d 1011, 1016 (2d Cir. 1997), *abrogated on other grounds*, *United States v. Perez*, 129 F.3d 255 (2d Cir. 1997). Following entry of judgment on July 8, 1999, notices of appeal were timely filed by the State on July 29, 1999, and by the petitioner on August 2, 1999.

The district court's decision on a motion for a writ of habeas corpus is reviewed *de novo*. *See Chalmers v. Mitchell*, 73 F.3d 1262, 1266 (2d Cir. 1996); *Maldonado v. Scully*, 86 F.3d 32, 35 (2d Cir. 1996).

A. *Fair notice*

The district court ruled that, as to Lurie's conviction on the purchaser counts,

> there is substantial evidence that the jury convicted petitioner not by finding the requisite intent but based solely on [a prosecution witness's interpretation of N.Y. Gen. Bus. Law § 352-e(2)]. [The witness's] interpretation of section 352-e(2) was just that, an interpretation. The statute did not adequately put sponsors [of cooperative buildings] on notice that they must cease sales or face criminal liability.

Lurie I, 1999 WL 246809, at *7. The State argues that the district court incorrectly found a constitutional fair notice violation because the statute found ambiguous is not the statute Lurie was charged with violating, and that therefore the ruling was "contrary to the standard of review for habeas corpus petitions" and "established a new rule of constitutional law in violation of *Teague v. Lane*, 489 U.S. 288 (1989)." The State also argues that the district court erred in holding that Lurie exhausted his fair-notice claim in the state courts.

1. *Facts bearing on the fair-notice claim*

The prosecution called as an expert witness Assistant Attorney General Mary DiStephan, Director of Regulatory Compliance at the Attorney General's Real Estate Finance Bureau, who testified about the state attorney general's procedures and requirements for filing and

amending the real estate securities offering plans that are required for sales of real estate cooperatives. According to DiStephan, when the information in the original offering plan was no longer correct, the sponsor

> would be under an obligation to give that information [*i.e.*, the correct information] to prospective purchasers, because he's under an obligation to give full and fair disclosure. And, that means, current and updated information.
>
> So, to the extent that any [information] of the offering plan is not current and updated and accurate and complete he must immediately amend the plan and give that information to [prospective] purchasers. [He is] [u]nder a constant obligation, not just [as to] the type of plan[ ] initially accepted for filing, but, throughout his selling activity, to make sure that he gives full and fair disclosure.

DiStephan testified that an amendment cannot be distributed to prospective purchasers until it is accepted for filing.

On redirect examination, DiStephan gave the testimony that is the focus of the fair-notice claim. She testified that it was standard practice for sponsors to refrain from selling apartments while an amendment to the offering plan was pending lest purchasers rely on an offering plan that the sponsor knows to be incorrect. She further testified to the attorney general's belief that a sponsor was obliged to give potential purchasers full and fair disclosure of the building's financial status and not to sell apartments on the basis of an offering plan that the sponsor knew to be materially false. In support of such an obligation, DiStephan testified that, according to the attorney general, a sponsor *must* refrain from selling apartments while the sponsor awaits approval of a pend-

ing amendment to the offering plan, so that buyers do not rely to their likely detriment on the unamended plan.

The statute underlying this policy was never mentioned at trial, but DiStephan's testimony about a sponsor's obligations was concededly grounded on an interpretation of New York General Business Law § 352-e(2), the text of which is set forth in the margin.[2] The wording of this provision speaks only about offering plans. DiStephan and the attorney general (as she testified) read the statute to apply as well to offering plan *amendments*, a reading that would impose a moratorium on sales during the pendency of an amendment to an offering plan. (Violation of § 352-e(2) is a misdemeanor, *see* N.Y. Gen. Bus. Law § 359-g(2) (McKinney 1996), but Lurie was not charged with violating that statute.)

The district court agreed with Lurie that "the rule of lenity should be applied to this case to preclude the prosecution from using section 352-e(2) as a basis for criminal sanctions." *Lurie I*, 1999 WL 246809, at *5. The rule of lenity was held applicable on two grounds. First, the statute speaks of offerings, and does not mention amendments. Second, Acting Justice Patricia Williams of the New York State Supreme Court had considered in another case whether sales are permissible during the

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[2] That provision reads in pertinent part:

> Unless otherwise provided by the regulation issued by the attorney general, the offering statement or statements or prospectus required in subdivision one of this section shall be filed with the department of law at its office in the city of New York, prior to the public offering of the security involved. ***No offer, advertisement or sale of such securities shall be made in or from the state of New York until the attorney general has issued to the issuer or other offeror a letter stating that the offering has been filed.***

N.Y. Gen. Bus. Law § 352-e(2) (McKinney 1996) (emphasis added).

pendency of an amendment and had concluded that § 352-e(2) allowed them, because "while it may be the Department of Law's *policy* that a sponsor cease cooperative sales pending acceptance for filing of amendments, it is not a *requirement* of the Martin Act nor of any of the regulations promulgated pursuant thereto." *People v. Dansker*, Ind. # 11454/92, at 10-11 (N.Y. Sup. Ct. Dec. 17, 1993).

2. *Exhaustion*

The State argues that Lurie failed to exhaust his fair-notice claim. Lurie's brief on direct appeal to the Appellate Division raised six claims of error but failed to raise a claim under the rule of lenity or the requirement of fair notice. The first time Lurie invoked the rule of lenity (seeking reversal on the ground that the rule precluded application of § 352-e(2) to his conduct) was in his *reply* brief to the Appellate Division. Lurie had earlier pointed out Justice Williams's holding on the issue of whether § 352-e(2) applied to pending amendments, but only as an argument that the trial court wrongly construed § 352-e(2)—not in terms of lenity or fair notice. The Appellate Division affirmed without reference to the rule of lenity.[3] *See* 673 N.Y.S.2d at 62-64.

Lurie again invoked the rule of lenity when he unsuccessfully sought permission to appeal to the New York Court of Appeals, but this time raised it only in a footnote.

The State argues that because Lurie raised his rule-of-lenity argument only (i) in a reply brief on direct appeal as of right, and (ii) in a footnote in a rejected bid for dis-

[3] Lurie's brief on this appeal states that "[a] motion to reargue, which again raised the issue of the Rule of Lenity, was also denied." We see no such motion, and the brief does not undertake to explain why such a motion would matter for present purposes.

cretionary appeal, the argument was never properly presented before the state courts. If so, Lurie has failed to exhaust the available state-court remedies.[4]

Waiver. Lurie contends that the State waived the exhaustion issue in the following cryptic observation by government counsel in the district court hearing:

> I believe *in discussing the rule of lenity*, I said, really, my substantive points as to the mandatory presumption aspect, i[s] that because of the Court's instruction, the jury was not required to find or accept that testimony and, therefore, it was not mandatory. . . . *Mr. Baker also made these arguments. He did make these arguments in the Appellate Division.*

Hearing Tr., Feb. 17, 1999, at 36 (emphasis added). The State responds that the second emphasized passage references Lurie's substantive argument in the Appellate Division that DiStephan misstated the duty of a sponsor, not any argument there that DiStephan's testimony implicated the rule of lenity.

AEDPA disfavors a state waiver of exhaustion: "A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement." 28 U.S.C. § 2254(b)(3); *see also Mercadel v. Cain*, 179 F.3d 271, 276 (5th Cir. 1999) (per curiam). Whatever counsel was saying, we do not

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[4] The State also emphasizes that the rule of lenity is a statutory presumption lacking a constitutional dimension, and that invocation of the rule, even if properly presented, therefore was ineffective notice of the federal nature of the claim. As discussed below, *see post*, at A20, however, the Supreme Court has said that the rule of lenity protects a defendant's right to fair warning, and recognized a due process aspect of fair warning. *See Liparota v. United States*, 471 U.S. 419, 427, 105 S. Ct. 2084, 2089 (1985).

read it as an "express" waiver of the exhaustion requirement.

Exhaustion requirement. Pursuant to AEDPA, a federal court may grant an application for a writ of habeas corpus on behalf of a state prisoner only where (i) "the applicant has exhausted the remedies available in the courts of the State," (ii) "there is an absence of available State corrective process," or (iii) "circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). (The text of the relevant provisions of 28 U.S.C. § 2254 are reprinted in the margin.[5]) This AEDPA standard is substantially

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[5] The provisions of § 2254 that are relevant to exhaustion of state remedies are as follows:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State;
>
> or
>
> (B)(i) there is an absence of available State corrective process; or
>
> (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254.

identical to the pre-AEDPA exhaustion standard. *Compare* 28 U.S.C.A. § 2254(b) (West Supp. 1999), *with* 28 U.S.C. § 2254(b) (1994). Consistent with our pre-AEDPA standard, we "will not consider a constitutional challenge that has not been 'fairly presented' to the state courts," *Ayala v. Speckard*, 89 F.3d 91, 94 (2d Cir. 1996) (quoting *Picard v. Connor*, 404 U.S. 270, 275, 92 S. Ct. 509, 512 (1971)), *rev'd in banc on other grounds*, 131 F.3d 62 (2d Cir. 1997); nor will we deem a petition to be in compliance with § 2254's requirements—in particular, that state courts be given the first opportunity to evaluate federal claims—unless "the nature or presentation of the claim" in the state forum was "likely to alert the court to the claim's federal nature," *Daye v. Attorney Gen.*, 696 F.2d 186, 192 (2d Cir. 1982) (in banc).

Where there is no further state proceeding for petitioner to pursue, *see* 28 U.S.C. § 2254(b)(1)(B)(i), or where further pursuit would be futile, *see* 28 U.S.C. § 2254(b)(1)(B)(ii), this Court can, in certain circumstances, address the merits of a habeas petition even if it contains unexhausted claims, *see* 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.").

State remedies. Under New York law, defendants are entitled to a single request for leave to appeal to the Court of Appeals. Collateral review of a New York conviction is available in the form of a motion to vacate the judgment. *See* N.Y. Crim. Proc. Law § 440.10 (McKinney 1994). Here, however, Lurie has exhausted all avenues of direct appeal (including his one request for leave to appeal to the Court of Appeals), and collateral review is barred for claims that were or could have been raised on direct appeal (as could the rule of lenity). *See* N.Y. Crim. Proc. Law § 440.10(2)(a), (c); *People v. Ford*, 613

N.Y.S.2d 688, 689 (2d Dep't 1994) (applying § 440.10(2)(c)); *People v. Skinner*, 552 N.Y.S.2d 932, 934-35 (1st Dep't 1990) (applying § 440.10(2)(a)); *see also Bossett v. Walker*, 41 F.3d 825, 829 (2d Cir. 1994). Neither further direct appeal nor collateral review is available to Lurie in the state courts.

Application to these facts. Lurie explicitly raised the fair-notice issue before two state courts. On his appeal as of right in the Appellate Division, he raised the claim in his reply brief. Under New York law, however, a claim of error first raised in a reply brief is not properly presented to the reviewing court. *See People v. Ford*, 513 N.Y.S.2d 106, 107 (1987) (citing *State Farm Fire & Cas. Co. v. LiMauro*, 481 N.Y.S.2d 90, 95 (2d Dep't 1984) ("It is beyond cavil that raising a new substantive issue of law for the first time in a reply brief is improper . . . ."), *aff'd* 492 N.Y.S.2d 534 (1985)); *People v. Abreu*, 669 N.Y.S.2d 560, 562 (1st Dep't 1998). Thus Lurie did not properly present his rule-of-lenity argument on his appeal as of right.

In his petition for leave to appeal to the New York Court of Appeals, Lurie raised his rule-of-lenity argument in a footnote. However, consideration before the Court of Appeals is discretionary review, which the Court of Appeals declined to grant. Presenting a claim for the first time to a state court of discretionary review is insufficient to exhaust the claim unless the court considers it. *See Castille v. Peoples*, 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989). Neither of Lurie's explicit references to the rule of lenity were sufficient to raise that claim properly in the New York courts.

Lurie also claims that his rule-of-lenity argument was sufficiently raised by implication in his initial brief to the Appellate Division, which pointed out that DiStephan's interpretation of § 352-e(2) was contrary to the interpretation adopted by Justice Williams. He claims

that this surmounts the bar set by *Daye*, 696 F.2d 186, which identified the following as two of the ways a petition may state the legal and factual bases of a claim: (i) asserting the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (ii) alleging a pattern of facts that is well within the mainstream of constitutional litigation. *See id.* at 192-93. We think it is a close call both as to whether the terms of Lurie's arguments were so particular as to require one to think of the rule of lenity, and as to whether the pattern of facts alleged falls within the usual rule-of-lenity pattern—particularly since Lurie was not *charged* under the contested provision (§ 352-e(2)), and the relevance of that law to his conviction was tangential. We need not decide that close question, however, because we ultimately find that Lurie's fair-notice claim lacks merit. *See* 28 U.S.C. § 2254(b)(2).

3. *Merits*

Under AEDPA, a writ under § 2254 may issue on behalf of a state prisoner only if the state court's ruling is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Supreme Court recently illuminated this standard in *Williams v. Taylor*, 529 U.S. ___, 120 S. Ct. 1495 (2000).[6]

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[6] To avert unnecessary confusion, two cautions may be useful:

1. The *Williams v. Taylor* discussed here was one of two cases titled *Williams v. Taylor* decided by the Supreme Court on April 18, 2000. *Compare Williams v. Taylor*, 529 U.S. ___, 120 S. Ct. 1495 (2000) (Petitioner Terry Williams), *with Williams v. Taylor*, 529 U.S. ___, 120 S. Ct. 1479 (2000) (Petitioner Michael Wayne Williams).

2. The *Williams v. Taylor* opinion discussed in the body of the opinion was decided by a split majority: Justice Stevens's

Before considering any conflict between the state court ruling and Supreme Court precedent, we must first decide whether Lurie's claim is based on a principle of Supreme Court caselaw that was "clearly established" when the state court ruled. *See id.* at 1511 ("The threshold question under AEDPA is whether [petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final."). Moreover, the phrase "clearly established Federal law, as determined by the Supreme Court" refers only "to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 1523; *accord Welch v. City of Pratt*, 214 F.3d 1219, 1222 (10th Cir. 2000).

The rule of lenity is that "[i]n criminal prosecutions . . . ambiguities in [a] statute [are] resolved in the defendant's favor." *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993). It is "reserved . . . for those situations in which a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *Moskal v. United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 465 (1990) (quoting *Bifulco v. United States*, 447 U.S. 381, 387, 100 S. Ct. 2247, 2252 (1980)). Such a persisting ambiguity "should be resolved in favor of lenity." *Liparota v. United States*,

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opinion was joined by five other Justices in three of its five parts, *see* 120 S. Ct. at 1499-503, 1511-16 (Parts I, III, and IV of the opinion of Stevens, *J.*, in which O'Connor, Kennedy, Souter, Ginsburg and Breyer, *JJ.*, join), while Justice O'Connor's opinion was joined by four other Justices for the point—particularly relevant to this appeal—delineating the proper standard for federal habeas review, *see* 120 S. Ct. at 1518-23 (Part II of the opinion of O'Connor, *J.*, in which Rehnquist, *C.J.*, and Kennedy and Thomas, *JJ.*, join, and in which Scalia, *J.*, joins except as to the footnote).

471 U.S. 419, 427, 105 S. Ct. 2084, 2089 (1985) (quoting *Rewis v. United States*, 401 U.S. 808, 812, 91 S. Ct. 1056, 1059 (1971)) (internal quotation marks omitted); *see also United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222, 73 S. Ct. 227, 229 (1952) ("We should not derive criminal outlawry from some ambiguous implication.").

The rule of lenity is a canon of statutory construction, not in itself federal law. *See United States v. Torres-Echavarria*, 129 F.3d 692, 698 n.2 (2d Cir. 1997); *United States v. Harris*, 959 F.2d 246, 258 (D.C. Cir. 1992). Federal courts cannot apply such a canon of construction to state statutes except to serve a federal constitutional interest. The rule of lenity, however, is called into service to protect the constitutional right to fair warning: "Application of the rule of lenity ensures that criminal statutes will provide *fair warning* concerning conduct rendered illegal . . . ." *Liparota*, 471 U.S. at 427, 105 S. Ct. at 2089 (emphasis added). As the Supreme Court has explained:

> There are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. Second, as a sort of junior version of the vagueness doctrine, *the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.* Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct

> that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

United States v. Lanier, 520 U.S. 259, 266-67, 117 S. Ct. 1219, 1225 (1997) (emphasis added) (citing, *inter alia*, *Kolender v. Lawson*, 461 U.S. 352, 355-57, 103 S. Ct. 1855, 1856-58 (1983), and *Bouie v. City of Columbia*, 378 U.S. 347, 353-54, 357-59, 84 S. Ct. 1697, 1702-06 (1964)) (citations and internal quotation marks omitted).

Fair notice, of course, *is* a right of federal constitutional dimension, grounded in the due process guarantee, established by the Supreme Court, and requiring that a criminal statute "give fair warning of the conduct that it makes a crime." *Bouie*, 378 U.S. at 350, 84 S. Ct. at 1701; *see also Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926) (striking down on due process grounds a state criminal statute that was insufficiently "explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties").

On the ground that the rule of lenity is a canon of construction rather than a federal law, at least two circuits have determined—and we see no Supreme Court caselaw to the contrary—that federal courts cannot vacate a state conviction on lenity grounds unless a state criminal statute (i) is unconstitutionally vague, or (ii) otherwise fails to give constitutionally required "fair notice." *See Poole v. Wood*, 45 F.3d 246, 249 (8th Cir. 1995) (vagueness); *Sabetti v. DiPaolo*, 16 F.3d 16, 19 (1st Cir. 1994) (fair notice).

The constitutional guarantee that a criminal defendant have been afforded "fair notice" of the possibility that

the contested behavior is deemed criminal was well-established and clearly recognized at the time of Lurie's conviction. *See, e.g.*, *Bouie*, 378 U.S. at 350-51, 84 S. Ct. at 1701. Lurie's rule-of-lenity claim is clearly premised on that constitutional right. Under the AEDPA standard, Lurie's claim is therefore asserted on the basis of federal law of sufficient clarity and authority.

It remains for us to decide whether the challenged ruling of the state trial court was "contrary to" such federal law or an "unreasonable application" of it. In determining whether a state prisoner is entitled to federal habeas relief because his conviction "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," § 2254(d)(1), we "give independent meaning to both the 'contrary to' and 'unreasonable application' clauses of the statute." *Williams v. Taylor*, 120 S. Ct. at 1519; *accord Clark v. Stinson*, 214 F.3d 315, 320 (2d Cir. 2000). We do so because (as the Supreme Court has observed):

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "*contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Williams v. Taylor, 120 S. Ct. at 1519 (quoting § 2254(d)(1)); *see also Sacco v. Cooksey*, 214 F.3d 270, 273 (2d Cir. 2000) (per curiam). Otherwise (*i.e.*, if the

"contrary to" language were read to cover state-court decisions that involve only incorrect *application* of Supreme Court precedents), the "unreasonable application" language of § 2254 would be rendered "a nullity." *Williams v. Taylor*, 120 S. Ct. at 1520; *cf. Ratzlaf v. United States*, 510 U.S. 135, 140-41, 114 S. Ct. 655, 659 (1994) (stating that "[j]udges should hesitate" before treating statutory language as "surplusage"). Thus two questions are posed: Was the state court's decision "contrary to" the Supreme Court's rulings on fair notice? If not, was it an "unreasonable application of" those precedents?

a. *"Contrary to" precedent*

A state court decision is "contrary to" existing Supreme Court precedent (i) when it applies a rule of law "that contradicts the governing law set forth in" the Supreme Court's cases, *Williams v. Taylor*, 120 S. Ct. at 1519, or (ii) when it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Supreme Court's] precedent," *id.* at 1519-20. *Accord Clark*, 214 F.3d at 320; *Hameen v. Delaware*, 212 F.3d 226, 235 (3d Cir. 2000).

In either event, a state court ruling is "contrary to" Supreme Court precedent only if it is " 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed' " to the precedential holding. *Williams v. Taylor*, 120 S. Ct. at 1519 (quoting *Webster's Third New International Dictionary* 495 (1976)).

The wrinkle here is that Lurie was not charged with a violation of the statute (§ 352-e(2)) as to which he claims notice was unfair. Lurie claims that the introduction of DiStephan's testimony regarding sponsors' obligations, as informed by § 352-e(2), was "contrary to"

the Supreme Court's fair-notice caselaw. The district court agreed with Lurie that DiStephan's testimony allowed the jury to convict Lurie without finding that he had the requisite mens rea for the crime:

> Here, there is substantial evidence that the jury convicted petitioner not by finding the requisite intent but based solely on DiStephan's . . . interpretation of section 352-e(2) . . . . The statute did not adequately put sponsors on notice that they must cease sales or face criminal liability. . . . [S]ection 352-e(2) arguably formed the predicate for petitioner's conviction . . . .

Lurie v. Wittner, No. 98 Civ. 7697, 1999 WL 246809, at *7 (S.D.N.Y. Apr. 26, 1999) ("*Lurie I*").

None of the Supreme Court cases cited by Lurie presents "a set of facts that are materially indistinguishable from" the facts presented on this appeal. *Williams v. Taylor*, 120 S. Ct. at 1519-20. All of them involved the applicability of the fair-notice requirement (sometimes via the rule of lenity) to the very statute that defined the charged crime. *See Lanier*, 520 U.S. at 261, 264-72, 117 S. Ct. at 1222, 1224-28; *Liparota*, 471 U.S. at 421-33, 105 S. Ct. at 2086-92; *Kolender*, 461 U.S. at 354, 357-62, 103 S. Ct. at 1856, 1858-60; *Rabe v. Washington*, 405 U.S. 313, 314-16, 92 S. Ct. 993, 993-94 (1972) (per curiam); *United States v. Bass*, 404 U.S. 336, 337, 339-47, 92 S. Ct. 515, 517, 518-22 (1971); *Rewis v. United States*, 401 U.S. 808, 809, 811-12, 91 S. Ct. 1056, 1058-60 (1971); *Bouie*, 378 U.S. at 349, 355-61, 84 S. Ct. at 1700, 1703-06; *United States v. Harriss*, 347 U.S. 612, 613, 617-624, 74 S. Ct. 808, 810, 812-15 (1954); *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 218-26, 73 S. Ct. 227, 228-31 (1952); *Lanzetta v. New Jersey*, 306 U.S. 451, 452-58, 59 S. Ct. 618, 618-21 (1939); *McBoyle v. United States*, 283 U.S. 25, 25-27,

51 S. Ct. 340, 340-41 (1931); *Connally*, 269 U.S. at 388-95, 46 S. Ct. at 126-29; *cf. Hughey v. United States*, 495 U.S. 411, 413, 422, 110 S. Ct. 1979, 1981, 1985 (1990) (adopting the narrower of two possible interpretations of a provision governing restitution remedies); *Crandon v. United States*, 494 U.S. 152, 158, 110 S. Ct. 997, 1001-02 (1990) (applying the rule of lenity in a civil suit where the standard for liability was set forth in a criminal statute); *Marks v. United States*, 430 U.S. 188, 191-92, 97 S. Ct. 990, 992-93 (1977) (justifying the nonretroactivity of a judicial precedent by reference to the requirement of fair warning).

The other way a state court decision could be "contrary to . . . clearly established Federal law, as recognized by the Supreme Court," is for the court to apply a rule of law "that contradicts the governing law set forth in" Supreme Court precedent. *Williams v. Taylor*, 120 S. Ct. at 1519. The only way the New York courts could have applied a rule of law that contradicts the governing law set forth in the Supreme Court's fair-notice precedents would have been to uphold a defendant's conviction for a crime where the defendant *could not* have discerned the scope of the convicting law's prohibitions even by searching the statutory and other laws defining the alleged crime. *See Moskal v. United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 465 (1990). On this appeal, however, Lurie does not even assert that the statutes *under which he was charged* were ambiguous. It therefore cannot be said that the New York courts applied a rule of law "that contradicts the governing law set forth in" Supreme Court precedent. *Williams v. Taylor*, 120 S. Ct. at 1519.

Accordingly, the state court's decision was not "contrary to . . . clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1).

b. *"Unreasonable application of" precedent*

Where the state-court decision is not directly opposed to Supreme Court precedent, but involves an application of the high court's caselaw, federal habeas petitions are judged under the "unreasonable application" standard. In *Williams v. Taylor*, the Supreme Court clarified the reasonableness standard in two ways:

First, the reasonableness of an application of federal law is judged by an objective standard. *See Williams v. Taylor*, 120 S. Ct. at 1521-22. Rather than decide reasonableness by reference to the decisions of "all reasonable jurists," which might lead a federal habeas court to "rest[ ] its determination . . . on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did," federal courts "should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.*; *see also Clark*, 214 F.3d at 320-21; *Barnabei v. Angelone*, 214 F.3d 463, 469 (4th Cir. 2000).

Second, an *unreasonable* application of federal law is different from an application that is simply *incorrect* or *erroneous*. *See Williams v. Taylor*, 120 S. Ct. at 1522-23. The Court emphasized that:

> In § 2254(d)(1), Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

120 S. Ct. at 1522; *accord Hameen*, 212 F.3d at 235.

The Supreme Court also somewhat clarified what it means for a state-court decision to be an "unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court." In particular, *Williams v. Taylor* considered a prisoner's claim that the "state-court decision . . . correctly identifie[d] the governing legal rule but applie[d] it unreasonably to the facts of [the] particular prisoner's case." 120 S. Ct. at 1520; *accord Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). The Supreme Court ruled that under the proper standard for evaluating claims of "unreasonable application," such a claim, if valid, "certainly would qualify as a decision 'involv[ing] an unreasonable application of . . . clearly established Federal law.' " *Williams v. Taylor*, 120 S. Ct. at 1520 (alterations in original); *accord Clark*, 214 F.3d at 320.

The present appeal, however, presents a slightly different question. While *Williams v. Taylor* involved the reasonableness of the application of a legal principle that clearly governed the set of facts presented, *see* 120 S. Ct. at 1511 (ruling that "the merits of [petitioner's] claim are squarely governed by" Supreme Court precedent), on this appeal petitioner would have us extend the Supreme Court's fair-notice caselaw to situations materially different from those considered in the high court's precedents. Specifically, petitioner contends that it was objectively unreasonable for the state courts to refuse to apply the Supreme Court's fair-notice precedents, which deal with ambiguity in the statute defining the *charged* offense, to a situation in which the state prisoner was *not* charged with violation of the ambiguous statute.

In *Williams v. Taylor*, the Supreme Court explicitly declined to determine whether an unreasonable refusal to extend a constitutional doctrine is sufficient to warrant federal habeas relief under AEDPA:

> The Fourth Circuit also held in [*Green v. French*, 143 F.3d 865, 869-70 (4th Cir. 1998),] that state-court decisions that unreasonably extend a legal principle from our precedent to a new context where it should not apply (*or unreasonably refuse to extend a legal principle to a new context where it should apply*) should be analyzed under § 2254(d)(1)'s "unreasonable application" clause. Although *that holding may perhaps be correct*, the classification does have some problems of precision. . . . *Today's case does not require us to decide how such "extension of legal principle" cases should be treated under § 2254(d)(1).* For now it is sufficient to hold that when a state-court decision unreasonably applies the law of this Court to the facts of a prisoner's case, a federal court applying § 2254(d)(1) may conclude that the state-court decision falls within that provision's "unreasonable application" clause.

Id. at 1521 (emphasis added; citation omitted); *accord Clark*, 214 F.3d at 320. (Justice O'Connor's elaboration on the "problems of precision" presented by the Fourth Circuit's holding is set forth in the margin.[7])

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[7] Regarding the "problems of precision" created by the treatment of unreasonable extensions and refusals to extend as "unreasonable applications," the Court stated that:

> Just as it is sometimes difficult to distinguish a mixed question of law and fact from a question of fact, it will often be difficult to identify separately those state-court decisions that involve an unreasonable application of a legal principle (or an unreasonable failure to apply a legal principle) to a new context. Indeed, on the one hand, in some cases it will be hard to distinguish a decision involving an unreasonable extension of a legal principle from a decision involving an unreasonable application of law to facts. On the other hand, in many of the same cases it will also be difficult to distin-

In a recent plurality opinion that announced the judgment of the Supreme Court, four Justices agreed that "[a] state determination may be set aside under [AEDPA's] standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone*, 530 U.S. ___, ___, 120 S. Ct. 2113, 2120 (2000) (plurality opinion of Kennedy, *J.*, in which Rehnquist, *C.J.*, and Scalia and Thomas, *JJ.*, join). This proposition failed to command a majority of the Court. *See id.* at 2127 (O'Connor, *J.*, concurring in the judgment) (agreeing with the plurality that the state court's decision "was neither contrary to, nor an unreasonable application of," Supreme Court law, but restating the AEDPA standard for herself with reference to *Williams v. Taylor*, which declined to answer this question); *id.* at 2142 (Stevens, *J.*, with whom Souter, Ginsburg and Breyer, *JJ.*, join, dissenting) (opining that the state court's decision was "contrary to" established Supreme Court precedent). Justice O'Connor's opinion is arguably more narrow than the plurality's and therefore constitutes the holding of the Court. *See Marks*, 430 U.S. at 193, 97 S. Ct. at 993 (ruling that, where no opinion earns a majority, the holding of the Court is that position taken by the Justice or Justices who concurred in the judgment on the narrowest ground).

Because we ultimately determine that the state court's application of the fair-notice precedents was *not* "objectively unreasonable," *see post*, at A31-34, we decline

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> guish a decision involving an unreasonable extension of a legal principle from a decision that arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law[.]

Williams v. Taylor, 120 S. Ct. at 1521 (internal quotation marks omitted).

to decide on this appeal whether unreasonable refusals to extend Supreme Court precedents are sufficient to satisfy AEDPA's requirement of an "unreasonable application of" Supreme Court caselaw. Instead, we assume *arguendo* that an unreasonable refusal to extend a Supreme Court precedent to cover other situations would satisfy § 2254(d)(1), and move on to examine whether the "refusal to extend" challenged here was unreasonable.

In all of the Supreme Court fair-notice precedents petitioner cites, the defendant was charged under the allegedly ambiguous statute. *See ante*, at A24-25 (listing cases). Here, however, Lurie was not charged with violation of § 352-e(2), and the implications of that provision were introduced only on redirect examination, to demonstrate that the attorney general's office believed that it was the sponsor's obligation to disclose material changes in the offering plan to buyers, who would otherwise rely on the materially false offering plan. Thus Lurie's claim is *not* that the statute under which he was charged was phrased such that he could not know his actions to be illegal. Rather, he relies on a more attenuated theory:

> (i) The fraud statutes under which Lurie were charged were clear enough, *see ante*, at A5 (listing the statutes under which Lurie was charged);
>
> (ii) however, the jury was allowed to infer that Lurie's behavior was fraudulent on the basis of an official's testimony as to the state's understanding of Lurie's obligations under one particular uncharged statute of the state real estate securities fraud laws;
>
> (iii) therefore, because the interpretation offered was the broader of (at least) two plausible inter-

pretations of the uncharged statute, and because Lurie's actions would not have violated that particular statute under the narrower interpretation, the jury was not entitled to consider his noncompliance with the broader interpretation in its deliberations as to Lurie's intent to defraud potential investors in violation of the charged statutes.

Lurie is asking this Court to hold that it is "objectively unreasonable" for state courts to receive evidence bearing on a defendant's state of mind where (i) that evidence takes the form of testimony as to the defendant's legal obligations under uncharged statutes, and (ii) those legal obligations are subject to a less expansive interpretation, under which the defendant was in compliance with those specific obligations.

This is a cantilevered extension of the Supreme Court's fair-notice precedents, which focus on ambiguities in the charged violation. On this appeal, we need not decide that such an extension is never warranted; rather, we conclude that the state courts' decision to decline such extension on these facts cannot be considered "objectively unreasonable."

The requirement of fair notice is justified by the concern that defendants will be convicted of "criminal outlawry" based *not* on a clearly proscribed crime, but instead based upon a theory "derive[d] . . . from some ambiguous implication" of the statute defining the crime. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222, 73 S. Ct. 227, 229 (1952). That concern is not implicated here. Lurie was charged under statutes proscribing "fraud" and "larceny"—*not* violation of § 352-e(2). Actions in derogation of § 352-e(2) are neither necessary nor sufficient to convict a defendant of fraud in connection with real estate securities, and we see no evidence here the jury considered them to be so in

convicting Lurie.[8] The Appellate Division made that point in its opinion on Lurie's direct appeal:

> [DiStephan] explained the conversion process and the statutory requirements, and informed the jury of the nature and timing of defendants' disclosures. She never testified as to the ultimate issue; rather, she left for the jury to decide whether the evidence of defendants' conduct, viewed in the context of the statutory requirements, proved beyond a reasonable doubt that defendants intentionally engaged in a fraudulent scheme to obtain money from unsuspecting purchasers and shareholders.

People v. Lurie, 673 N.Y.S.2d 60, 63 (1st Dep't 1998). Lurie contends that the jury might have concluded that Lurie was violating "the statutory requirements" and therefore—*ipso facto*—committing fraud. But there is no reason to think that the jury believed that Lurie's purported (but uncharged) violation of this technical statutory requirement was itself sufficient to demonstrate knowing, intentional fraud.[9]

The state court ruling challenged by Lurie is evidentiary in character. Lurie was a sponsor of a cooperative real estate venture regulated by the attorney general, and DiStephan's testimony expressed the attorney general's regulatory policy. That testimony was admitted to show

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[8] Though Judge Scheindlin asserts that there is "substantial evidence" that DiStephan's testimony substituted for a jury finding of intent, she cites none. After a searching review of the record and the district court opinion, the only evidence we find is a request by the jury during deliberations regarding DiStephan's testimony about the propriety of selling real estate securities at various times.

[9] As the district court observed: "The jury was free to accord whatever weight it chose to DiStephan's . . . testimony. The fact that the jury may have given [her] testimony inordinate weight does not constitute a due process violation."

that Lurie, as a commercial participant in the regulated industry, would know that he was deviating from industry norms and the conventional understanding of the real estate securities disclosure laws. And that showing is arguably relevant to whether Lurie harbored fraudulent intent in deciding to sell apartments, because (i) it evidences the common understanding of the sponsor's obligation to potential purchasers, and (ii) it confirms the intuition that selling apartments on the basis of an offering plan that one *knows* to be materially false is *inconsistent* with full and fair disclosure to purchasers and *consistent* with fraudulent intent.

That ruling may have been sound or not. But the question here is whether that ruling was "objectively unreasonable" in light of the extant Supreme Court fair-notice caselaw. We conclude that it was not.

Introduction of the regulatory assumption did not preclude Lurie's introduction of evidence that he believed that the disclosure laws allowed him to sell during the pendency of an amendment. More important, it did not preclude the jury from determining that Lurie's conduct was inept and uninformed rather than fraudulent, or that (*even if* Lurie believed himself to be in technical compliance with the disclosure laws) his sale of apartments to buyers who were relying on information he knew to be materially false was nonetheless fraudulent. DiStephan's testimony notwithstanding, the jury was still required to find Lurie guilty of fraud *only* if it determined that he fulfilled the *mens rea* requirement of the charged crimes.

In short, the evidentiary ruling may have been sound or not, but the refusal by the New York courts to apply the rule of lenity to a statute that was neither charged nor mentioned at trial is not an "unreasonable application" of Supreme Court precedent. The district court does not demonstrate that its decision is an application

of Supreme Court precedents in terms of AEDPA's requirements.[10] We therefore reverse, and hold that the refusal of the New York courts to apply the Supreme Court's fair-notice guarantees in this attenuated context did not amount to an "unreasonable application" of Supreme Court precedent.

B. *Advice-of-counsel defense*

Lurie made an unsolicited offer of proof at trial that his former attorney Richard Koral would testify to, *inter alia*, the advice he had given Lurie.[11] Lurie argued that this testimony would bear upon his state of mind at the time of the alleged crimes, and would demonstrate that he had relied on advice of counsel concerning disclosure and filing requirements.

The trial court conditionally excluded Koral's testimony on the ground that Koral's testimony as to advice

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[10] The district court opinion relies heavily on *United States v. D'Alessio*, 822 F. Supp. 1134 (D.N.J. 1993). *D'Alessio* was decided by a federal district court, not the Supreme Court; and in any event it contains no analysis that would justify the grant of habeas in favor of Lurie. In that case, a county sheriff was charged with, *inter alia*, mail fraud for allegedly violating local taxpayers' intangible right to his honest services. *See id.* at 1137. The indictment charged that the sheriff used the mails to violate Rule 1:16-2 of the Rules Governing the Courts of the State of New Jersey, in violation of 18 U.S.C. §§ 1341, 1342. *See* 822 F. Supp. at 1137-38, 1140-45. Violation of the New Jersey court rule was thus the *sine qua non* of the mail fraud charge; if the court rule did not apply to sheriffs, then the predicate for the mail fraud charge did not exist.

In Lurie's case, for reasons stated earlier in this opinion, the linkage between § 352-e(2) and the charged fraud and larceny provisions is decidedly more attenuated.

[11] Counsel for Lurie also suggested four other areas about which Koral would testify. The trial court, however, concluded that each was irrelevant and refused to allow Koral to testify to them. Those determinations are not challenged on this habeas petition.

he had given Lurie was irrelevant without Lurie's testimony as to his actual state of mind. The district court's ground for the grant of Lurie's habeas petition as to the maintenance counts (and, apparently, an alternate ground as to the purchaser counts) is that the trial court's ruling deprived Lurie of his constitutionally guaranteed right to present a defense. According to the district court, the trial judge thus "forc[ed] [Lurie] to forfeit his fifth amendment right not to testify so that his attorney could testify," and violated Lurie's Sixth Amendment right to present a defense by requiring the sacrifice of one constitutional right (not to testify) as a condition for the exercise of another. *Lurie v. Wittner*, No. 98 Civ. 7697, 1999 WL 246809, at *7-*9 (S.D.N.Y. Apr. 26, 1999) ("*Lurie I*"). The district court concluded that this was " 'intolerable.' " *See id.* at *7 (quoting *Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967, 976 (1968)) (internal quotation marks omitted).

The State contends that the New York trial court properly required Lurie to lay the foundation for the advice-of-counsel testimony, and that doing so before allowing the attorney to testify "strikes a rational and fair balance between a defendant's right to present a defense and the state's interest in precluding potentially confusing and irrelevant testimony."

As the district court concluded: "Because there is no Supreme Court rule that mandates the admission of the type of evidence in dispute here, it cannot be said that the state-court decision is 'contrary to' clearly established Federal law as determined by the Supreme Court." *Lurie v. Wittner*, 75 F. Supp.2d 117, 124 (S.D.N.Y. 1999) ("*Lurie II*"). The next inquiry, as the district court properly identified it,

> is whether the state court decision was based on an "unreasonable application of" Supreme Court prece-

> dent. This entails identifying the applicable Supreme Court precedent. The applicable precedent . . . firmly establishes a defendant's right to present a complete and full defense subject only to reasonable restrictions. It is against this precedent that the state court decision must be judged.

Id. at 124-25 (footnote omitted).

The Sixth Amendment right to present a defense is "not unqualified; [it is] subject to 'countervailing public interests.' " *Buie v. Sullivan*, 923 F.2d 10, 11 (2d Cir. 1990) (quoting *Taylor v. Illinois*, 484 U.S. 400, 414, 108 S. Ct. 646, 656 (1988)). Even relevant testimony can be excluded, depending upon circumstances, without offending due process. *See Montana v. Egelhoff*, 518 U.S. 37, 42 n.1, 116 S. Ct. 2013, 2017 n.1 (1996) (plurality opinion of Scalia, *J.*) (noting the agreement of at least eight justices on this proposition, despite a 4-1-4 split); *see also id.* at 42, 116 S. Ct. at 2017 (Scalia, *J.*, with whom Rehnquist, *C.J.*, and Kennedy and Thomas, *JJ.*, join) (" 'The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.' " (quoting *Taylor*, 484 U.S. at 410, 108 S. Ct. at 653) (alteration in original)); *id.* at 62, 116 S. Ct. at 2026 (O'Connor, *J.*, dissenting, with whom Stevens, Souter and Breyer, *JJ.*, join) ("It is true that a defendant does not enjoy an absolute right to present evidence relevant to his defense.").

Specifically, it is permissible for a state court to exclude relevant evidence in order to prevent "confusion of the issues." *Michigan v. Lucas*, 500 U.S. 145, 149, 111 S. Ct. 1743, 1746 (1991) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986)) (internal quotation marks omitted); *see also* Fed. R. Evid. 403 ("Although relevant, evidence may be

excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues[ ] or misleading the jury . . . ."). The requirement that a proper foundation be laid for the admission of evidence serves that purpose among others, and is well established. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 178-80 & nn.3 & 4, 117 S. Ct. 644, 649-50 & nn.3 & 4 (1997) (citing Fed. R. Evid. 402).

The state trial court's reason for the conditional exclusion of Koral's testimony—"that Lurie's own testimony establishing reliance on counsel's advice was a prerequisite to the admission of the attorney's testimony and the proposed defense of reliance on advice of counsel," *People v. Lurie*, 673 N.Y.S.2d at 64—is properly characterized as foundational.

There is no Supreme Court precedent requiring that an advice-of-counsel defense be allowed in state court; indeed, the situations in which the advice-of-counsel defense may be employed are severely limited. *See, e.g., United States v. King*, 560 F.2d 122, 132 (2d Cir. 1977).

More fundamentally, Koral's testimony was immaterial. Koral purportedly would have testified to "what was done concerning the filing of various amendments and why they were filed . . . [and] the interpretation by Mr. Lurie's attorneys as to the amendments and what was required to be filed by way of financial disclosure." But even if Lurie was following advice of counsel in attempting to comply with § 352-e(2)'s technical requirements regarding disclosure to the state, that effort would not rebut the overwhelming evidence that Lurie failed to make full and fair disclosure *to apartment owners and would-be purchasers*: "A person is not absolved of willful wrongdoing because he relied on his attorney's advice." *Application of Second Additional Grand Jury*, 202 N.Y.S.2d 26, 39 (2d Dep't 1960) (citing *People v. Marcus*, 261 N.Y. 268, 277 (1933)). As the state trial

judge told Lurie's counsel: "You keep saying [this crime] is about late filing. I keep saying it is about two weeks of testimony about what people did or did not know, disclosure, fraud, deceit and concealment. That is what the crime is about."

The trial court's judgment may (or may not) have been correct as a matter of state law, but we conclude that it was not "contrary to" Supreme Court precedent or an "unreasonable application" thereof.

C. *Lurie's cross-appeal*

Lurie claims that the district court's ruling with respect to the advice-of-counsel testimony requires vacatur of the false instrument count "just as the [d]istrict [c]ourt found [it did] with respect to the remainder of the charges." We have held here, however, that the preclusion of Lurie's attorney's testimony does not require vacatur of "the remainder of the charges"; so even if we agree with Lurie that the false instrument count must be treated identically to the maintenance counts, such identical treatment here does not require vacatur of the false instrument count.

CONCLUSION

For the reasons stated above, we reverse the judgment of the district court insofar as it granted Lurie's petition for a writ of habeas corpus and affirm the judgment insofar as it denied that petition. The docket sheet reflects that on November 5, 1998, the district court stayed "all proceedings in furtherance of petitioner's surrender to the New York State Department of Correctional Services," and prohibited respondents from "undertak[ing] any efforts to cause petitioner to be taken into custody." If that stay is still in effect, it is hereby vacated.

Appendix B

(Order of United States Court of Appeals denying petition for Rehearing)

Appendix B

(Order of United States Court of Appeals Denying Petition for Rehearing)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 99-2425(L), 99-2426
Filed November 6, 2000

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the sixth day of November two thousand

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PRESENT:

HON. AMALYA L. KEARSE,
HON. DENNIS JACOBS,
HON. ROSEMARY S. POOLER,

CIRCUIT JUDGES, 2nd Cir.

BRETT K. LURIE,

Petitioner-Appellee-Cross-Appellant,

—v.—

BONNIE G. WITTNER, Acting Justice of the Supreme Court of the State of New York; ELIOT SPITZER, Attorney General of the State of New York; GLENN S. GOORD, Commissioner, New York State Department of Correctional Services,

Respondents-Appellants-Cross-Appellees.

A petition for panel rehearing having been filed herein by Brett K. Lurie,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
ROSEANN B. MACKECHNIE, Clerk

By BETH J. MEADOR
Beth J. Meador,
Administrative Attorney

Appendix C

(Opinion and order of United States District Court)

Appendix C

(Opinion and Order of United States District Court)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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98 Civ. 7697 (SAS)

BRETT K. LURIE,

Petitioner,

—against—

BONNIE G. WITTNER, Acting Justice of the Supreme Court of the State of New York; DENNIS C. VACCO, Attorney General of the State of New York;[1] GLENN S. GOORD, Commissioner, New York State Department of Correctional Services,

Respondents.

OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

Brett K. Lurie ("Lurie" or "petitioner") seeks a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 to invalidate a judgment of the Supreme Court of the State of New York, New York County (Wittner, J.), decided on April 25, 1996, convicting petitioner of various counts of

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[1] Although Eliot Spitzer is now the Attorney General, the caption has not been amended to reflect this as no motion has been made to do so.

Intentional Real Estate Securities Fraud as contained in the Martin Act (New York General Business Law § 352-c(5)&(6)); Scheme to Defraud in the First Degree (New York Penal Law § 190.65(1)(b)); Grand Larceny in the Second and Third Degrees (New York Penal Law §§ 155.40 & 155.35); and offering a False Instrument for Filing in the First Degree (New York Penal Law § 175.35). Lurie was sentenced to a cumulative sentence of two to six years imprisonment. The judgement of conviction was affirmed by the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, on April 21, 1998. *See People v. Lurie*, 673 N.Y.S.2d 60 (1st Dep't 1998). A motion to reargue was denied on June 18, 1998. Leave to appeal to the New York Court of Appeals was denied on August 27, 1998. *See People v. Lurie*, 608 N.Y.S.2d 64 (1998).

Lurie makes three arguments in support of his petition. First, Lurie argues that section 352-e(2) should be construed against a finding of criminal liability in accordance with the rule of lenity given the ambiguity in the law existing at the time of petitioner's conviction. Next, petitioner argues that the trial court's preclusion of his attorney as a defense witness violated his Sixth Amendment right to present a defense and his due process right to a fair trial. Finally, he argues that an interpretation of New York General Business Law § 352-e(2) ("section 352-e(2)") offered by the people's expert witness removed the element of intent from the jury's consideration and relieved the prosecution of its burden of proof in violation of his due process rights. Because this Court agrees with petitioner as to his first and second grounds for relief, the petition is conditionally granted as to all counts except count 28, subject to a decision by the State of New York to retry petitioner.

I. Facts

From 1989 to 1990, petitioner was the sponsor and manager of five residential cooperative buildings. Affidavit of Christine Duisin, attorney for respondents, sworn to on January 19, 1999 ("Duisin Aff."), ¶2. While serving as sponsor and manager, petitioner failed to make monthly maintenance and mortgage payments and pay monthly bills for water, oil and taxes. *Id.* In fact, the only monthly bill he did pay was the $15,000 monthly management fee of which he was the recipient. *Id.* By October 1990, petitioner owed the five cooperatives over $1.8 million in unpaid maintenance, mortgage and other fees. *Id.* Despite this massive debt, petitioner never disclosed these non-payments to minority shareholders/apartment owners. *Id.*, ¶3. Petitioner also failed to disclose the dire financial condition of these cooperatives to potential apartment buyers. *Id.* Although petitioner *filed* certain amendments to the original offering plans with the New York State Department of Law that disclosed the extent of his financial difficulties, he continued to sell apartments before such amendments were *accepted for filing* by the Department. This is significant because amendments are not available to potential purchasers until they are accepted for filing by the Department of Law.

For this activity, Lurie was convicted of eight counts of scheme to Defraud (Counts 1-8), nine counts of Intentional Real Estate Securities Fraud ("Martin Act offenses") (Counts 9-13, 15-17 & 19), three counts of Grand Larceny, second degree (Counts 20, 21 & 23), three counts of Grand Larceny, third degree (Counts 24, 26 & 27), and one count of Offering a False Instrument for Filing (Count 28). *See* Affidavit of Mark M. Baker, petitioner's attorney, sworn to October 28, 1998 ("Baker Aff."), Exh. 5. All of the offenses charged have a *mens*

rea requirement. For example, the Martin Act offenses include the following language:

> 5. Any person, . . . , who **intentionally engages in any scheme to defraud** ten or more persons or to obtain property form ten or more persons **by false or fraudulent pretenses, representations or promises**, . . . , shall be guilty of a class E felony.
>
> 6. Any person, . . . , who **intentionally** engages in fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale, or who makes any material false representation or statement **with intent to deceive or defraud**, . . . , shall be guilty of a class E felony.

N.Y. Gen. Bus. Law § 352-c(5)&(6) (emphasis added). Scheme to Defraud, which involves similar conduct, reads as follows:

> A person is guilty of a scheme to defraud in the first degree when he: . . . engages in a scheme constituting a systematic ongoing course of conduct **with intent to defraud** more than one person or to obtain property from more than one person **by false or fraudulent pretenses, representations or promises**, and so obtains property with a value in excess of one thousand dollars from one or more such persons.

N.Y. Penal Law § 190.65(1)(b)(emphasis added). The other offenses contain similar language.[2]

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[2] A person is guilty of grand larceny when he steals property of a certain value. N.Y. Penal Law §§ 155.40 & 155.35. The term "steal" is defined as a wrongful taking with intent to deprive another of property. N.Y. Penal Law § 155.05(1). The Offering a False Instrument count includes the filing of a false statement with intent to defraud. N.Y. Penal Law § 175.35.

During the prosecution of this case, Assistant Attorney General Mary DiStephan was called as an expert on the New York State Attorney General's procedures and requirements with respect to real estate securities. Appellant's Appendix, A 709. When asked about the role of the Department of Law, DiStephan responded:

> The Department of Law regulates the sale by adopting regulations which tell a sponsor exactly what he has to do before he engages in those sales. And he must comply with those requirements before he goes to anybody and offers them the specific unit or the specific shares associated with the unit, either in a co-op or condominium or other cooperative interests in realty, we call it.

Id., A 721. When there is a change in the information contained in the initial Offering plan,

> . . . the sponsor would be under an obligation to give that information to prospective purchasers, because he's under an obligation to give full and fair disclosure. And, that means, current and updated information.
>
> So, to the extent that any inflation [sic] of the offering plan is not current and updated and accurate and complete he must immediately amend the plan and give that information to [prospective] purchasers. Under a constant obligation, not just the type of plan, initially accepted for filing, but, throughout his selling activity, to make sure that he gives full and fair disclosure.

Id., A 732. DiStephan explained that once the amendment is accepted for filing, it can then be distributed to prospective purchasers and tenants. *Id.*, A 735.

On redirect examination, DiStephan repeated her testimony that it is the sponsor who has the obligation to comply with disclosure requirements that are imposed with respect to cooperatives. *Id.*, A 915-16. When asked by the prosecutor whose obligation is it in the event of a material change in the offering to stop sales, DiStephan responded that it is the sponsor's.[3] *Id.*, A 916.

To rebut a finding of intent to defraud, petitioner sought to introduce the testimony of his attorney Richard Koral. Koral would have testified as to negotiations he had on petitioner's behalf with various creditors in an attempt to save the buildings. *Id.*, A 937. In addition, Koral would have testified as to what he believed was required to be filed by way of financial disclosure by describing the filing of various amendments and the reasons for those filings. *Id.*, A 938. This testimony was intended to show that petitioner did certain things based on his attorney's advice and, because he did so, he had no intent to defraud any prospective purchaser. *Id.*, A 942. Although petitioner argued that Koral would not be testifying as to petitioner's state of mind but rather as to

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[3] In stating that a sponsor must cease sales until such time as any amendments are accepted for filing, DiStephan was interpreting section 352-e(2) of the New York General Business Law which states:

> Unless otherwise provided by regulation issued by the attorney general, the offering statement or statements or prospectus required in subdivision one of this section shall be filed with the department of law at its office in the city of New York, prior to the public offering of the security involved. No offer, advertisement or sale of such securities shall be made in or from the state of New York until the attorney general has issued to the issuer of other offeror a letter stating that the offering has been filed.

N.Y. Gen. Bus. Law § 352-e(2). Although petitioner was not charged with violating § 352-e(2), violations of this statute are treated as misdemeanors. *See* N.Y. Gen. Bus. Law § 359-g(2).

facts evidencing his state of mind, *id.* at A 953, 960, the court barred the testimony holding that a person's state of mind can only come from that person, here Lurie. *Id.*, A 953. The court then invited petitioner to testify on his own behalf. *Id.*, A 964-65. This invitation was declined.

The judge then charged the jury. Regarding expert testimony, the judge instructed:

> Expert testimony is presented to you to assist you, but it is not binding upon you. And you may disregard testimony of an expert in whole or in part. However, I do not intend to instruct you to disregard expert testimony. But neither are you to accept such opinions without question merely because the person was called as an expert. In other words, if you accept the reasoning and process of the expert, you may accept his conclusion. If you do not accept the reasoning and process and opinion, you may disregard the conclusion offered. In other words, expert testimony should be considered and weighed by you in the same way you should consider and weigh the testimony of all the other witnesses.

Id., A 180-81.

The judge then charged the jury as to the elements of a scheme to defraud. *Id.*, A 190-96. With regard to the third element, engaging in a scheme with intent to defraud, the judge stated as follows:

> To defraud means to cheat or defraud them of property or things of value. According to the law, a person intends to defraud one or more persons or to obtain property from one or more persons by false or fraudulent pretenses, representations or promises when his conscious aim or objective is to defraud one or more persons or to obtain property from one or more persons.

> Intent to defraud or obtain property is a question of fact for you to decide in light of all of the evidence presented to you.
>
> The burden is on the prosecution to prove beyond a reasonable doubt that the defendant intended to defraud more than one person or obtain property from more than one person.

Id., A 194-95. The judge then instructed that the above definition of intent also applies to the intentional real estate fraud counts and the offering a false instrument count. *Id.*, A 211, 212-13, 223.

II. Discussion

A. Scope of the Writ

Counts 4 through 8 allege that petitioner schemed to defraud current tenants into making their monthly maintenance payments by not disclosing the dire financial straits facing the buildings. These counts will be called the "maintenance payment counts." Counts 1, 2 and 3 also allege a scheme to defraud but the victims are would-be purchasers as opposed to occupants. These counts will be called the "purchaser counts."[4] For the purchaser counts, petitioner received an indeterminate sentence of imprisonment of one to three years. A 80. For the maintenance payment counts, petitioner also received an indeterminate sentence of imprisonment of one to three years, to run consecutively to the sentence imposed on the purchaser counts. *Id.* On the remaining count, Count 28, the sentence imposed was one to three years, to run concurrently with the sentence on the purchaser counts. *Id.* All of the sentences were to run

[4] Also included as purchaser counts are the Martin Act and grand larceny offenses (Counts 9-13, 15-17, 19-21, 23, 24, 26 & 27).

concurrently except for counts 4 through 8 (the maintenance payment counts) which were to run consecutively. *Id.* Thus, petitioner faces an indeterminate term of imprisonment with a minimum of two and a maximum of six years. A 81. In addition to the terms of imprisonment, victim service fees were imposed. *Id.*

The first question to be addressed is whether this Court should review the purchaser counts given the valid and independent conviction for filing a false instrument (Count 28).[5] Under the so-called "concurrent sentence doctrine", a reviewing court "need not determine the validity of a conviction on one or more counts for which a sentence was imposed that is concurrent with the sentence on a count for which conviction has been upheld." *United States v. Bermingham*, 855 F.2d 925, 933-34 (2d

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[5] The arguments made by petitioner in support of the instant habeas petition do not in any way affect this count which reads as follows:

> Between November 1, 1989 and on or about November 3, 1989, in the County of New York and elsewhere, the defendant, knowing that a written instrument contained a false statement or false information, and with intent to defraud the State, did offer or present to a public office or public servant with knowledge or belief that it would be filed with, registered or recorded and become part of records of such public office or public servant, that is, the defendant submitted for filing with the New York State Department of Law Real Estate Financing Bureau the fourth amendment to the offering plan to convert to a co-operative ownership the premises at 488 Ocean Parkway, sworn to by the defendant, which amendment contained a false statement and false information that there were no material changes in the terms of the offering, and concealed defaults by the sponsor and defaults by the cooperative corporation.

A 220. Although petitioner notes the argument raised by the government concerning the non-applicability of his arguments to Count 28 in his letter to the Court dated April 12, 1999, he does not make any substantive argument to the contrary.

Cir. 1988) (citations omitted). This doctrine, however, has recently been eroded due to the heightened concern over the collateral consequences flowing from convictions on multiple counts, even where the aggregate sentence is unaffected. *Id.* at 934. In fact, utilization of the concurrent sentence doctrine is now the exception rather than the rule. *See United States v. Ruffin*, 575 F.2d 346, 361 (2d Cir. 1978).

After reviewing the five collateral consequence factors enumerated in *United States v. Vargas*, 615 F.2d 952, 959-60 (2d Cir. 1980), I find the effect on possible parole to be the most relevant. The *Vargas* court explained that the timing of parole may be affected if the offense behavior involves multiple separate offenses. This is especially important here given that petitioner was sentenced to an indeterminate term of imprisonment of 1 to 3 years on the purchaser counts. A parole board faced with one count of filing a false instrument, along with eighteen other counts, would in all likelihood view the offense conduct more seriously than if only the false instrument count was involved. Accordingly, the habeas relief granted herein applies to all of the purchaser counts.

The next question is whether the requested habeas relief should apply to the maintenance payment counts as well as the purchaser counts. Petitioner's arguments regarding the rule of lenity and the DiStephan testimony do not directly implicate the maintenance payment counts. Petitioner argues, however, that there is prejudicial spillover from the purchaser counts, which are directly affected by those arguments.[6] This alleged

[6] The Attorney General argues that petitioner never raised the claim that the evidence as to the purchaser counts had a prejudicial spillover effect on the other counts in state court and, hence, that he did not exhaust his state remedies on this issue. This argument is rejected for two reasons. The first is that the question of prejudicial

spillover results from the fact that the entire case against Lurie was based on a single prosecutorial theory—that fraudulent intent could be found as to purchasers and shareholders alike from the fact that petitioner continued to sell in violation of section 352-e(2). According to petitioner, this view was taken by the prosecuting attorney in summation, the judge in her charge, and the jury in its verdict. Although this argument has some merit, my decision to grant habeas relief on the maintenance payment counts is based on an alternative ground—the preclusion of attorney Richard Koral as a defense witness, discussed *infra*. Petitioner states that Mr. Koral could have shed light on all of the charged conduct. That he was precluded from doing so as to the purchaser and maintenance payment counts alike makes the latter as constitutionally infirm as the former. Accordingly, the habeas relief granted herein applies to the maintenance payment counts as well as the purchaser counts. The fact that the sentence on the maintenance payment counts is consecutive to the sentence on Count 28 and the purchaser counts does not alter this result. *See Peyton v. Rowe*, 391 U.S. 54, 67 (1968) (prisoner serving con-

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spillover did not arise until this habeas petition was *sub judice* and this Court raised a question concerning the interplay between the maintenance payment counts and the purchaser counts. Accordingly, petitioner cannot be expected to exhaust a claim that did not yet exist at the time of the state proceedings. Furthermore, petitioner did raise his claims as to both the maintenance payment and purchaser claims alike in his letter to the Honorable George Bundy Smith of the New York Court of Appeals. *See* Baker Aff., Exh. 13, p. 2 ("The underlying premise running through all the allegations in the indictment was that Lurie had failed to make maintenance and mortgage payments, and thereafter had concealed such deficiencies from minority shareholders and would-be purchasers."). For these reasons, I find that petitioner's prejudicial spillover claim was previously incorporated in the state proceedings below and that failure to exhaust will not preclude this Court from considering the same.

secutive sentences is "in custody" under any one of them for purposes of the habeas statute).

B. Rule of Lenity

Petitioner argues that the rule of lenity should be applied in this case to preclude the prosecution from using section 352-e(2) as a basis for criminal sanctions. According to petitioner, section 352-e(2) is ambiguous as to the conduct it proscribes for several reasons. First, the language of the statute does not address amendments, it only addresses offerings. Hence, the statute does not explicitly prohibit sales during the period in which amendments have been filed but not yet accepted. Second, in *People v. Norman Dansker, et al.* [New York County Indict. No. 11454/92], Judge Patricia Williams interpreted section 352-e(2) and reached a conclusion diametrically opposed to that reached by Judge Wittner. Judge Williams wrote:

> The People contend that it has always been the policy of the Department of Law that a sponsor stop selling apartments to the public given any adverse change in circumstances. This policy, it is argued, is the natural inference based on the Martin Act regulations and the time period allowed for the Department of Law to review amendments submitted for filing, (approximately some six months). Indeed, the People further argue that only if the sponsor stops selling cooperative units can consumer fraud be prevented pending review of submitted amendments. *This Court finds that, while it may be the Department of Law's policy that a sponsor cease cooperative sales pending acceptance for filing of amendments, it is not a requirement of the Martin Act nor of any of the regulations promulgated pursuant thereto.* The Martin Act requires only that

written disclosure be made with the Department of Law given any adverse change in the sponsor's position.

Dansker, at 10-11 (emphasis added).

Respondents argue that the rule of lenity is inapplicable where a state court is interpreting a state statute. According to respondents, a federal court deciding a *habeas* petition has no authority to compel a state court's statutory interpretation. In addition, respondents argue that the rule of lenity is inapplicable here since Lurie was not charged with violations of section 352-e(2).

The Supreme Court has recognized that "requiring mens rea is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.' " *Liparota v. United States*, 471 U.S. 419, 427 (1985) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). "Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota*, 471 U.S. at 427. The Supreme Court has recently reformulated this concept into the requirement of fair warning which subsumes the rule of lenity.

According to the Court,

> [t]here are three related manifestations of the fair warning requirement. First, the vagueness doctrine bars enforcement of a "statute which either forbids or requires the doing of an act in terms so vague that [women] of common intelligence must necessarily guess at its meaning and differ as to its application." Second, as a sort of "junior version of the vagueness doctrine," the canon of strict construction of criminal statutes, or rule of lenity, ensures fair

> warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered. Third, although clarity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute, due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope. In each of these guises, the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal.

United States v. Lanier, 520 U.S. 259, 117 S.Ct. 1219, 1225 (1997) (internal citations omitted).

The next issue is whether a federal court has the authority to apply the rule of lenity to a state statute. In deciding this it is necessary to distinguish between a strict definition of the rule of lenity and the rule of lenity as a component of the fair notice requirement. It appears that when notice is not an issue, the rule of lenity, as strictly defined, cannot be applied by a federal court. *See Mueller v. Sullivan*, 141 F.3d 1232, 1235 (7th Cir. 1998) (state court's definition of the term "wilful" not subject to federal review—"the rule of lenity, a canon of statutory construction, is for states to use or abjure, as their domestic law requires"); *Tarrant v. Ponte*, 751 F.2d 459, 466 (1st Cir. 1985) (whether robberies constituted one offense or two was not subject to federal interpretation—court rejected petitioner's argument that "the 'rule of lenity' has been transformed from a rule of construction applicable to statutes that federal courts are charged with interpreting, into a constitutional presumption mandated by the double jeopardy clause and made binding on the states through the due process clause of the fourteenth amendment") (citation omitted). However, when notice

is in issue, the rule of lenity comes into play as a component of the fair warning requirement. *See United States v. Ballestas*, 97 Mag. 843, 1997 WL 240704, at *3 (S.D.N.Y. May 9, 1997) (Dolinger, M.J.) ("Defendant cannot be convicted for conduct that she could not reasonably foresee was a criminal act. As recently reiterated by the Supreme Court, this 'fair warning' requirement is enforced through three legal principles." [vagueness, rule of lenity, and novel construction]); *Poole v. Wood*, 45 F.3d 246, 249 (8th Cir. 1995) ("alleged wrongful interpretation of state criminal statutes cannot be decided in a federal habeas corpus action"—"only possible redress under the vagueness doctrine would be that state statute was unconstitutionally vague in that it did not provide fair notice to persons potentially subject to it"); *Sabetti v. DiPaolo*, 16 F.3d 16, 19 (1st Cir. 1994) (petitioner has pointed to nothing in the federal Constitution other than the "fair notice" guaranty that would require a state court to apply the rule of lenity when interpreting a state statute).

In short, at the time of petitioner's conviction section 352-e(2) did not provide adequate notice to sponsors that all sales must cease during the period in which amendments have been filed but not yet accepted. This conclusion is reached by application of the rule of lenity or the fair notice requirement or both.[7] As notice is clearly in issue here, the semantic label given to the controlling principle is of no import. It is also of no concern that petitioner was not charged with violations of section 352-e(2). In *United States v. D'Alessio*, 822 F. Supp.

[7] Although petitioner did not raise the fair notice requirement apart from the rule of lenity until oral argument, the two principles are sufficiently interrelated to bar a finding of waiver on petitioner's part. *See Wood v. Hall*, 130 F.3d 373 (9th Cir. 1997) ("Arguments raised for the first time at oral argument are generally waived.") (citation omitted).

1134, 1138 (D.N.J. 1993), a sheriff was indicted for mail fraud for accepting campaign contributions which he then used personally in violation of Rule 1:16-2 of the Rules Governing the Courts of the State of New Jersey. The court determined that there was "a significant degree of ambiguity regarding the applicability of the Rule to county sheriffs." *Id.* at 1143. With regard to this ambiguity, the court stated:

> Although the court here is asked to construe Rule 1:16-2 and not the criminal statute pursuant to which the indictment was brought, the notice concerns motivating the rule of lenity provide wise guidance to this court. Specifically, they suggest that any uncertainty regarding the applicability of the Rule should be resolved in favor of defendants.

Id.

Here, there is substantial evidence that the jury convicted petitioner not by finding the requisite intent but based solely on DiStephan's "sales must cease" testimony. Her interpretation of section 352-e(2) was just that, an interpretation. The statute did not adequately put sponsors on notice that they must cease sales or face criminal liability. Because section 352-e(2) arguably formed the predicate for petitioner's conviction, I find that fair notice concerns bar its introduction at any subsequent retrial, whether in the form of expert testimony or jury charge. This is not to say, however, that an expert witness cannot testify as to the Department of Law's policies or to the fact that information contained in amendments is not available to would-be purchasers until such amendments have been accepted for filing. The only restriction imposed is that section 352-e(2) cannot be introduced for the proposition that the law requires that all sales cease during the waiting period.

C. Attorney as Witness

The trial judge ruled that Lurie's own testimony establishing reliance on counsel's advice was a prerequisite to the admission of Richard Koral's testimony. *See* Baker Aff., Exh. 3, p. 20. Petitioner argues that forcing him to forfeit his fifth amendment right not to testify so that his attorney could testify violated his sixth amendment right to present a defense and his due process right to a fair trial. I agree.

"The right to present a defense is based on a criminal defendant's right, under the sixth and fourteenth amendments, to compulsory process for obtaining witnesses." *United States ex rel. Ashford v. Director, Illinois Dep't of Corrections*, 871 F.2d 680, 686 (7th Cir. 1989) (citing *Washington v. Texas*, 388 U.S. 14 (1967)). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). In deciding whether a constitutional violation has occurred, a court must determine whether "the testimonial evidence to be presented by the witness 'was relevant, material, and vital to the defense, and whether the exclusion of that evidence was arbitrary.' " *Ashford*, 871 F.2d at 686 (quoting *Lange v. Young*, 869 F.2d 1008, 1011 (7th Cir. 1989)). Courts must be especially sensitive to situations where one constitutional right must be surrendered in order to assert another. The Supreme Court has found this situation to be "intolerable." *See Simmons v. United States*, 390 U.S. 377, 394 (1968).

In cases where intent is a crucial element of the prosecution's case, a defendant should be allowed to introduce relevant testimony that goes to that subject. For example, in *Hughes v. Mathews*, 440 F. Supp. 1272, 1275 (E.D.Wis. 1977), *aff'd*, 576 F.2d 1250 (7th Cir. 1978), the prosecution had the burden of proving that the defen-

dant had the specific intent to kill. This burden was eased with a jury charge that included the rebuttable presumption that a person intends the natural and probable consequences of his acts. *Id.* The petitioner "sought to rebut this presumption by introducing expert psychiatric testimony to show that at the time of the crime he was unable to form the specific intent to take the lives of his victims." *Id.* This proposed testimony was rejected by the trial court. *Id.* The federal court deciding the *habeas* petition found that the "combined effect of the jury instruction on presumed intent and the exclusion of evidence to prove mental incapacity to form specific intent resulted in a conclusive presumption violative of the Fourteenth Amendment's due process clause." *Id.* (citing *Morissette v. United States,* 342 U.S. 246 (1952)).

The situation presented by Lurie is quite similar. Without petitioner testifying, the only countervailing evidence regarding petitioner's fraudulent intent could have come from his attorney. But this is precisely the testimony the trial judge precluded simply because petitioner did not first take the stand. This is not a situation where the excluded expert testimony would have been cumulative, causing, at most, a harmless error. *See Fennell v. Goolsby*, 630 F. Supp. 451, 461 (E.D.Pa. 1985) (exclusion of testimony concerning battered woman syndrome deemed harmless where there was significant testimony concerning petitioner's mental state from two other psychiatrists). Nor is this a situation where the excluded testimony could not have exculpated defendant. *See Ashford*, 871 F.2d 686 (testimony from prosecuting attorney impeaching a witness could not have exculpated the defendant—exclusion was harmless). Here, non-cumulative, potentially exculpatory evidence was erroneously excluded by the trial judge, a result forbidden under the Constitution.

Although petitioner recognizes that reliance on counsel is not a defense in New York, evidence of such advice can be a "circumstance indicating good faith which the trier of fact is entitled to consider on the issue of fraudulent intent." *Bisno v. United States*, 299 F.2d 711, 719 (9th Cir. 1962). In *Bisno*, a jury instruction on advice of counsel was denied. The court reasoned as follows:

> Since Bisno did not testify as a witness in the case, the record is silent as to whether he sought in good faith the advice of counsel and fully and honestly laid all of the facts before his counsel and in good faith and honestly followed such advice, relying upon it and believing it to be correct . . . .
>
> Under the general instruction given by the district judge on specific intent, the jury was entitled to consider the testimony of Bisno's counsel for what it was worth and not more. We find no error in the refusal to give the requested instruction.

Id. at 720.

Here, Lurie is not complaining that he did not get a jury charge on advice of counsel, he is complaining that the testimony was excluded from the jury altogether. Moreover, as explained at oral argument, Lurie arguably would not have to take the stand to prove that he followed his attorney's advice.[8] According to Lurie, his filings with the Department of Law, by their very existence, corroborate that he followed his counsel's advice.

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[8] Even in those cases where the defendant has not established a good faith reliance on advice of counsel, the attorney is still permitted to testify. The only consequence is that the defendant does not get an advice of counsel jury charge. *See United States v. Evangelista*, 122 F.3d 112, 117-18 (2d Cir. 1997) (because there was no basis in the evidence for the defendants' reliance-on-advice defense, they were not entitled to an instruction apprizing the jury of that theory).

Petitioner should be allowed, upon retrial, to offer evidence that would negate a finding of fraudulent intent. If calling his attorney as a witness is the only way he can do so, so be it. Objections as to relevancy and hearsay can be made by the prosecution on a question-by-question basis and ruled upon accordingly. To prevent Lurie from doing otherwise constitutes the type of constitutional error that cannot be deemed harmless.

D. DiStephan Testimony

Petitioner argues that DiStephan's testimony, in particular, the testimony that a sponsor is prohibited from making sales before amendments are accepted for filing, created a mandatory presumption of fraudulent intent thus relieving the prosecution of its burden of proof on the element of intent. This testimony, which arguably turned the offenses into strict liability crimes, amounted to a jury instruction from a quasi-judge. In support of this argument, petitioner points to the fact that the jury convicted him of those counts involving apartment sales that closed while the amendments were pending but acquitted him on those counts involving an apartment sale that closed after the amendment was accepted for filing.[9] *See* Baker Aff., Exh. 5. Petitioner neglects to mention his conviction on five counts of scheme to defraud current shareholders based on their continuing maintenance payments. *Id.* Petitioner does concede, however, that five individuals, minority board members in their respective co-operatives, testified that they only

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[9] In actuality, as to Lyn B. Smith, whose closing occurred on August 27, 1990, approximately one month after the amendments were accepted for filing on August 1, 1990, petitioner was found guilty of scheme to defraud but not guilty of intentional real estate securities fraud and grand larceny. This apparent inconsistency detracts from petitioner's argument that DiStephan's "Prohibition against sales" testimony was overwhelming.

continued to pay maintenance because they were never informed at board meetings of the serious financial difficulties facing the buildings. *Id.*, Exh. 2, p. 38.

In further support of this mandatory presumption argument, petitioner points to a post-verdict interview with jury foreperson Ernestine Gadsen. According to Ms. Gadsen, DiStephan's testimony played a large part in the jury reaching a guilty verdict. Appellant's Appendix, A 1173. Ms. Gadsen expounded as follows:

> Like I said the filing of these various documents that have to be put on cooperatives and all this other stuff. Otherwise we would not have known just exactly what the procedures were. So we got the procedure information like that from her and then based on the things we saw, the documents that we looked over and other testimony we saw that yeah he wasn't in line. it didn't fall in line with what should have been done. *Now as to whether or not he was aware that he wasn't filing procedures and I can't quote and say breaking the law. We couldn't determine if he knew.*

Id., A 1174 (emphasis added).

The Due Process Clause of the Fourteenth Amendment "prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every element of a crime." *Francis v. Franklin*, 471 U.S. 307, 313 (1985) (citing *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979)); *see also Carella v. California*, 491 U.S. 263, 265 (1989). "A mandatory presumption instructs the jury that it must infer the presumed fact if the State proves certain predicate facts." *Francis v. Franklin*, 471 U.S. at 313. This type of error is categorized as a "trial error" rather than a "structural error" and is thus subject to the "harmless error" standard

enunciated by the Supreme Court, namely "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)).

Although there is the possibility that DiStephan's "sales must cease" testimony unduly influenced the jury, I cannot find that such testimony created a mandatory presumption with regard to the issue of intent. The trial judge not only instructed the jury as to expert witness testimony, she also explicitly instructed it on intent, stating that the prosecution must prove intent to defraud beyond a reasonable doubt. Thus, the judge did not impermissibly direct the jury to find fraudulent intent based on the fact that Lurie did not cease sales during the pre-acceptance period. The jury was free to accord whatever weight it chose to DiStephan's "sales must cease" testimony. The fact that the jury may have given such testimony inordinate weight does not constitute a due process violation. *Sandstrom* and its progeny are therefore inapposite.

The next question is whether DiStephan's testimony usurped the role of the trial judge in instructing the jury as to the applicable law. This issue turns on whether the expert states a legal conclusion (*e.g.*, that defendant violated a particular law) which is forbidden or whether it offers an opinion, even one that embraces an ultimate issue to be decided by the jury. *Compare United States v. Duncan*, 42 F.3d 97, 102-03 (2d Cir. 1994) (testimony of expert who merely posited factual conclusions and never expressed an opinion as to whether defendant was guilty of the offenses charged deemed admissible) *and United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1990) ("although an expert may opine on an issue of fact within the jury's province, he may not give testimony stating ultimate legal conclusions based on those facts")

with Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505, 509 (2d Cir. 1977) (testimony that did not concern practices in the securities field but provided legal opinions as to the meaning of the contract terms in issue deemed outside the expert's area of expertise); *United States v. Scop*, 846 F.2d 135 (2d Cir. 1988) (opinion that stock was in fact manipulated was highly prejudicial legal conclusion that invaded the province of the court to determine the law and instruct the jury accordingly); *and Hygh v. Jacobs*, 961 F.2d 359 (2d Cir. 1992) (testimony that police officer's conduct was not justified under the circumstances should have been excluded).

Here, DiStephan did not testify that Lurie was in fact guilty of the offenses charged. Hence, she did not offer a legal conclusion. Moreover, DiStephan's interpretation of section 352-e(2) was the same as that of the trial judge who stated:

> I made a mistake at trial. I should have directly told them the law in that regard and I didn't. It is the law. I should have just said that a sponsor must stop selling during the period between filing amendments which is consistent with my opinion and what I ruled on the law.

Baker Aff., Exh. 6, p. 46. The fact that DiStephan introduced the law rather than the judge can be viewed, in this instance, as harmless error. *See United States v. Unruh*, 855 F.2d 1363, 1376 (9th Cir. 1987) ("The trial judge's decision to let the testimony in, rather than explaining Regulation O in his instructions to the jury, is justified by the aid that it gave the jury in understanding other evidence presented as part of the prosecution's case. Any error on this point is not prejudicial). A finding of harmless error is buttressed by the fact that the judge instructed the jury as to the weight to be afforded expert testimony and thus put DiStephan's testimony in

its proper perspective. *See United States v. Fogg*, 652 F.2d 551, 557 (5th Cir. 1981). Accordingly, the fact that the prohibition against sales statute was explained by DiStephan rather than the judge is not a ground requiring reversal. However, as discussed in Section II. B, the "sales must cease" issue, whether in the form of expert testimony or jury charge, will be moot on retrial.

III. Conclusion

For the foregoing reasons, the petition for a writ of *habeas corpus is* granted as to all counts except Count 28, unless within 60 days of the date of this Opinion and Order the State of New York notifies the petitioner and this Court of its intention to retry the defendant on these counts. In this event, the issuance of the writ will be permanently stayed provided such trial is actually commenced within 90 days after such notice. As Count 28 remains unaffected by these proceedings, petitioner will have to serve the one to three year sentence imposed with respect thereto.

SO ORDERED:

/s/ SHIRA A. SCHEINDLIN
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
April 26, 1999

Appearances

For Petitioner:

Mark M. Baker, Esq.
Brafman, Gilbert & Ross, P.C.
767 Third Avenue, 26th floor
New York, New York 10017
(212) 750-7800

For Respondents:

Christine Duisin, Esq.
Assistant Attorney General for
the State of New York
120 Broadway
New York, New York 10271
(212) 416-8745

Appendix D

(Opinion and order of United States District Court upon reconsideration)

Appendix D

(Opinion and Order of United States District Court Upon Reconsideration)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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98 Civ. 7697 (SAS)

BRETT K. LURIE,

Petitioner,

—against—

BONNIE G. WITTNER, Acting Justice of the Supreme Court of the State of New York; DENNIS C. VACCO, Attorney General of the State of New York; GLENN S. GOORD, Commissioner, New York State Department of Correctional Services,

Respondents.

OPINION AND ORDER

SHIRA A. SCHEINDLIN, U.S.D.J.:

Brett K. Lurie ("Lurie" or "petitioner) has moved for reconsideration of that portion of the Opinion and Order dated April 26, 1999 ("Opinion and Order") denying *habeas* relief as to Count 28. Respondents have cross-moved for reconsideration of the entire Opinion and Order. On April 30, 1999, I withdrew the Opinion and Order pending the outcome of these motions. For the fol-

lowing reasons, I deny both motions and now re-instate the April 26, 1999 Opinion and Order.

Background

Petitioner was convicted, in Count 28, of violating section 175.35 of the New York Penal Law by filing a false instrument on November 1 to 3, 1989, to wit, the fourth amendment to the offering plan for the premises at 488 Ocean Parkway (the "Edgewood"). Section 175.35 reads as follows:

> A person is guilty of offering a false instrument for filing in the first degree when, knowing that a written instrument contains a false statement or false information, and with intent to defraud the state or any political subdivision, public authority or public benefit corporation of the state, he offers or presents it to a public office, public servant, public authority or public benefit corporation with the knowledge or belief that it will be filed with, registered or recorded in or otherwise become a part of the records of such public office, public servant, public authority or public corporation.

N.Y. Penal Law § 175.35. Petitioner's false statement, in part, is found at the end of the fourth amendment to the Offering Plan, which states: "Except as set forth in this Fourth Amendment and the first three amendments to the plan, there have been no material changes in this plan." *See* pp. 4-5, *infra*, for a discussion of materiality. In fact, at the time this amendment was filed, petitioner was in substantial arrears on both the mortgage and maintenance payments.[2] *See* Letter dated May 19, 1999 from

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[2] The falsity also results from the representations made in the certification filed with the original plan for the Edgewood property, discussed *infra*.

Mark M. Baker, Esq., counsel for petitioner ("May 19th letter"), Exh. F, pp. 2285 & 2287. *See also id.*, Exh. D, p. 5 (for comparable language used in the fifth amendment to the Edgewood plan).

Petitioner's Motion for Reconsideration

Petitioner argues that Count 28 should be overturned on the ground that the precluded testimony of Richard Koral, his real estate attorney, would have negated a finding of fraudulent intent. He supports this conclusion by citing to certain changes made to the applicable New York City Regulations which were not disclosed and did not take effect until after November 3, 1989.[3] As a result of these changes, amendments must now disclose:

> (vi) A statement as to whether the sponsor or holder(s) of unsold shares is current on all financial obligations to the cooperative, including, but not limited to, payment of maintenance, . . . In addition, state whether the sponsor or holder(s) of unsold shares is current on payments of underlying mortgages and all obligations under financing arrangements for which unsold shares have been pledged as collateral . . . .

13 N.Y.C.R.R. § 18.5(c)(3)(vi). According to petitioner, once it was announced on December 12, 1989 that these new requirements would soon be implemented, he was advised by Mr. Koral to include the above information in new amendments, which he did in a later filed fifth amendment to the Edgewood plan. *See* May 19th letter, p. 10 & Exh. D, p. 4.

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[3] According to petitioner, the disclosure requirements resulting from the changes in the law, which became effective August 15, 1990, were disclosed to the real estate bar approximately six weeks later, on December 12, 1989. *See* May 19th Letter, p. 9.

Petitioner's argument is unavailing for a number of reasons. First and foremost, the requirement to disclose arrears in mortgage and maintenance payments was not newly enacted with the 1990 changes. In fact, 13 N.Y.C.R.R. § 18.5(a)(2), which was part of original Part 18 adopted on June 2, 1982, states that:

> (2) An amendment must include a representation that all material changes of facts or circumstances affecting the property or the offering are included, unless the changes were described in prior amendment(s) submitted to but not yet filed with the Department of Law.

It is beyond dispute that the failure to make mortgage and maintenance payments is a material change of facts and circumstances. *See State of New York v. Rachmani Corp.*, 530 N.Y.S.2d 58, 62 (1988) (an omitted fact is material if it would have "significantly altered the 'total mix' of information made available" to a reasonable investor) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)). In addition, Mary DiStephan, an expert witness at trial, made the following statement in her affidavit in Opposition to the Motion to Dismiss:

> Finally, in August, 1990, the Attorney General promulgated regulations expanding the disclosures which would be required even if there were no default, on at least an annual basis, of the sponsor's total financial condition even in other projects where the sponsor or a principal of the sponsor owned in excess of ten percent of the shares or units. . . . ***This requirement to file an updating financial disclosure amendment at least annually expanded and supplemented the already existing requirement (existing almost 30 years) to immediately amend the offering plan whenever there is a***

> *material change of fact or circumstance affecting the offering.*

May 19th letter, Exh. A, pp. 5-6 (emphasis added). Therefore, although the 1990 changes delineated the precise financial information to be included in amendments, the duty to disclose sponsor defaults was already well-established.[4] Given this clearly delineated duty, it is inconceivable how any testimony from Richard Koral would impact on petitioner's fraudulent intent. Moreover, the evidence that would have been presented by Richard Koral is ambiguous. During the state court proceeding, petitioner's trial attorney told the judge:

> Mr. Koral will come in and testify that, in fact it was his interpretation and his advice among other attorneys and there will be documents that we will submit which will show that it was his belief and Mr. Lurie compiled and that when the law changed on October 15 [sic], Mr. Lurie had to file those amendments immediately.

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[4] The trial judge also reached this conclusion. During DiStephan's cross-examination, Judge Wittner stated:

> This is a question of law addressed to me in a motion to dismiss by the prior counts. If this amendment, the effective amendment, August 15, 1990, had changed the requirements under the law, I would have had to dismiss the indictment. But in that opinion, [sic] which I addressed all the issues, I found this, indeed, just reiterated what was already his obligations under the law.

Appellant's Appendix ("A") 877. As this is a valid interpretation of state law by a state judge, it is entitled to the presumption of correctness and will not be overturned by a federal court sitting in a *habeas* proceeding. *Cf. Fagan v. Washington*, 942 F.2d 1155, 1159-60 (7th Cir. 1991) ("When in doubt, we think it both impetuous and impolitic to impute to a state trial judge a misunderstanding of state law.").

A 951. Arguably, Koral's testimony would only explain why Lurie filed an accurate fifth amendment to the Edgewood Plan. The proffer of Koral's testimony does not include any representation by Koral that the fourth amendment to the Edgewood property was done in accordance with then-existing law based on his advice. Koral's proposed testimony is therefore irrelevant to Count 28. The exclusion of irrelevant evidence cannot support a violation of petitioner's Sixth Amendment right to present a defense. *See U.S. ex rel. Ashford v. Director, Illinois Dep't of Corrections,* 871 F.2d 680, 686 (7th Cir. 1989), *overruled on other grounds by, Tague v. Richards*, 3 F.3d 1133, 1140 (7th Cir. 1993) (such a violation occurs when the "testimonial evidence to be presented by the witness 'was relevant, material, and vital to the defense, and . . . the exclusion of that evidence was arbitrary' ") (quoting *Lange v. Young*, 869 F. 2d 1008, 1011 (7th Cir. 1989)).

Even assuming, *arguendo*, that Koral addressed the content of the fourth amendment, it is nontheless irrelevant to Count 28 for other reasons—namely the representations made by Lurie himself. The fourth amendment to the Edgewood property, much like the fifth amendment, contains a "No Material Changes" provision wherein Lurie stated that there have been no material changes in the plan despite the fact he was in default on the mortgage and maintenance payments. Lurie made a similar representation in the certifications filed with respect to the original offering plans, including the offering plan for the Edgewood property. *See* A 784 (where Mary DiStephan testified that "all of the Lurie plans have this identical certification"). With regard to each property, Lurie certified, in part:

> I am the sponsor and/or the principle [sic] of sponsor of the offering to convert the subject property to

> cooperative ownership. I understand that I have primary responsibility for compliance with the provisions of Article 23-A of the general business law, the regulation permigated (ph) by the Attorney General in Part 18, and such are [sic] the laws and regulations as may be applicable.
>
> I certify that the offering plan does and that *all documents submitted hereafter by me which amend or supplement the offering plan will one*, set forth the detailed terms of the transaction and *be complete, current, and accurate*. . . .
>
> Three, not omit any material fact . . . .
>
> Five, not contain any fraud, deception, concealment, suppression, false pretense, or fictitious or pretended purchase or sale. . . .
>
> I understand that violations are subject to the civil and criminal penalties of the general business and penal law.

A 785-86 (emphasis added). When Ms. DiStephan was asked when the certification expires, she responded: "It never expires. it indicates that anything that is filed with this certification, or anything that's filed thereafter, is subject to the certification." A 786.

In short, Lurie twice represented that documents filed in relation to the Edgewood property would contain complete and accurate information, in the original certification and in the amendment itself, when in fact they did not. Consequently, he cannot legitimately argue that he did not know of the falsity of the fourth amendment to the Edgewood property at the time of filing. Any testimony that could be presented by Richard Koral is therefore irrelevant to the issue of Lurie's fraudulent

intent. Accordingly, *habeas* relief is again denied as to Count 28.

Respondent's Motion for Reconsideration

A. Rule of Lenity

Respondents make several arguments in support of their motion for reconsideration. Their first argument addresses the Court's application of the rule of lenity. According to respondents, petitioner had adequate notice that sales must cease during the period in which amendments have not yet been accepted for filing. Such notice is derived from a cross-referencing of New York's General Business Law with its Codes, Rules and Regulations. In particular, New York General Business Law § 352-e(i)(a) states that "[i]t shall be illegal and prohibited for any person. . . to make or take part in a public offering or sale . . . *until there shall have been filed* with the department of law, prior to such offering, a written statement or statements, to be known as an 'offering statement' or 'prospectus' . . ." (emphasis added). "Filing," as defined in 13 N.Y.C.R.R. § 18.1(c)(6), means "the issuance of a letter from the Attorney General stating that an offering plan or *amendment* has been accepted for filing." (emphasis added). Respondents also cite various cases for the proposition that an amendment does not merely supplement the original offering plan but constitutes a new submission of the plan as amended.

This argument, however, misses the mark given the express statutory prohibition found in § 352-e(2). That section states as follows: "No offer, advertisement or sale of such securities shall be made in or from the state of New York until the attorney general has issued to the issuer or other offerer a letter stating that the offering

has been filed." The fact that this section does not include the filing of amendments within its purview is significant. This is the section where one would expect a prohibition pertaining to sales pending the filing of amendments to be found, if one existed. Yet § 352-e(2) contains no such prohibition. Respondents would, however, impute notice from a not-too-obvious cross-referencing of statutory provisions even though an explicit statutory provision governing the matter fails to mention amendments. It is unreasonable to expect a reasonable sponsor to comply with this convoluted notice requirement. This conclusion is supported by the contemporaneous opinion of Judge Patricia Williams in *People v. Dansker* [New York County Indict. No. 11454/921, wherein she states:

> This court finds that, while it may be the Department of Law's *policy* that a sponsor cease cooperative sales pending acceptance for filing of amendments, it is not a *requirement* of the Martin Act nor of any of the regulations promulgated pursuant thereto. The Martin Act requires only that written disclosure be made with the Department of Law given any adverse change in the sponsor's position.

People v. Dansker, at pp. 10-11 (emphasis in original).

Respondents have not cited evidentiary matter or a controlling decision which, if considered, would have required this Court to change its earlier conclusion. *See Eisert v. Town of Hempstead*, 918 F. Supp. 601, 606 (E.D.N.Y. 1996).

B. Failure to Exhaust State Remedies

The next argument raised by respondents involves the failure to exhaust state remedies and can be summarily

dismissed. Respondents contend that petitioner's rule of lenity claim is barred due to his failure to raise the fair notice requirement as a concept distinct from the rule of lenity until oral argument before this Court. This argument has been fully considered and rejected. *See* Opinion and Order, footnote 7 (the principles of fair notice and the rule of lenity are sufficiently interrelated to bar a finding of waiver on the part of petitioner). Respondents have not raised any new matter or controlling decision for the Court's consideration. *See Eisert*, 918 F. Supp. at 606 ("standard for granting a motion for reargument is strict 'in order to dissuade repetitive arguments on issues that have already been considered fully by the Court' ") (quoting *Ruiz v. Commissioner of the D.O.T. of the City of New York*, 687 F. Supp. 888, 890 (S.D.N.Y.), *aff'd*, 858 F.2d 898 (2d Cir. 1988)).

C. Sixth Amendment Claim—Ability to Present a Defense

Respondents final argument pertains to the attorney as witness portion of the Opinion. Respondents correctly point out that this court did not specifically apply the standard for *habeas* review as amended by the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA") in granting the petition on Sixth Amendment grounds. The new standard states:

> (d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was *contrary to, or involved an unreasonable application of, clearly established Federal law,* as determined by the Supreme Court of the United States; or

> (2) resulted in a decision that was made based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(emphasis added).

This standard, particularly § 2254(d)(1), has not yet been interpreted by the Second Circuit. However, several other appellate courts have developed various analytical frameworks in applying the standard. *See, e.g., O'Brien v. Dubois*, 145 F.3d 16 (1st Cir. 1998); *Green v. French*, 143 F.3d 865, 870 (4th Cir. 1998) (reasonable jurist approach taken); *Drinkard v. Johnson*, 97 F.3d 751, 767 (5th Cir. 1996) (same). The best approach to date can be found in *Matteo v. Superintendent*, 171 F.3d 877 (3rd Cir. 1998), wherein the Third Circuit adopted a modified version of the *O'Brien* framework. With regard to the first step of the analysis, the court stated:

> [W]e hold that the "contrary to" provision of AEDPA requires a federal habeas court first to identify the applicable Supreme Court precedent and determine whether it resolves the petitioner's claim. Like the First Circuit, we believe this analysis requires "something more than a recognition that the Supreme Court has articulated a general standard that covers the claim." Instead, the inquiry must be whether the Supreme Court has established a rule that determines the outcome of the petition. Accordingly, we adopt O'Brien's holding that "[t]o obtain relief at this stage, a habeas petitioner must show that Supreme Court precedent requires an outcome contrary to that reached by the relevant state court."

Id. at 888 (citations omitted).

Once the federal habeas court determines that the state court decision was not "contrary to" a rule espoused by

the Supreme Court, the next step is to determine whether the state court decision was based on an "unreasonable application of" Supreme Court precedent. *Id.* at 889. With regard to this inquiry, the Third Circuit has held:

> [T]he appropriate question is whether the state court's application of Supreme Court precedent was objectively unreasonable. The federal habeas court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent.

Id. at 889-90.

Here, Supreme Court precedent has established that: (1) a defendant has the right to present a defense; and (2) that right is subject only to reasonable restrictions. The right to present a defense was established in *Washington v. State of Texas*, 388 U.S. 14 (1967), and its progeny. In *Washington*, the Supreme Court stated:

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. at 19. This sentiment was reiterated several years later in *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973), wherein the Court stated that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 302. "The right of

an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the States accusations. " *Id.* at 294. Although this right is not absolute and may "bow to accommodate other legitimate interests in the criminal trial process," "its denial or significant diminution calls into question the ultimate 'integrity of the fact-finding process' and requires that the competing interest be closely examined." *Id.* at 295 (quoting *Berger v. California*, 393 U.S. 314, 315 (1969)). Furthermore, this right is an "essential attribute of the adversary system itself." *Taylor*, 484 U.S. at 408.

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of the courts that compulsory process be available for the production of evidence needed wither by the prosecution or the defense.

United States v. *Nixon*, 418 U.S. 683, 709 (1974). More recently, the Supreme Court has stated that "criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and *the right to put before a jury evidence that might influence the determination of guilt.*" *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (emphasis added).

The right to present a defense, however, is not absolute. According to the Supreme Court:

> A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. A defendant's interest in presenting such evidence may thus " 'bow to accommodate other legitimate interests in the criminal trial process.' " As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate, *only* where it has infringed upon a weighty interest of the accused.

United States v. *Scheffer*, 118 S.Ct. 1261, 1264 (1998) (quoting *Rock* v. *Arkansas*, 483 U.S. 44, 56 (1987)) (other citations omitted) (emphasis added).

Because there is no Supreme Court rule that mandates the admission of the type of evidence in dispute here, it cannot be said that the state court decision is "contrary to" clearly established Federal law as determined by the Supreme Court. The next inquiry, therefore, is whether the state court decision was based on an "unreasonable application of" Supreme Court precedent. This entails identifying the applicable Supreme Court precedent.[5]

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[5] Respondents cite the following three cases as applicable precedent: *United States v. Scheffer*, 118 S.Ct. 1261 (1998); *Taylor v. Illinois*, 484 U.S. 400 (1988), and *United States v. Nobles*, 422 U.S. 225 (1975). For the following reasons, these cases are factually inapposite to the case *sub judice*. In *Scheffer*, the Supreme Court held that Military Rule of Evidence 707, which makes polygraph evidence inadmissible in court-martial proceedings, does not unconstitution-

The applicable precedent, as stated above, firmly establishes a defendant's right to present a complete and full defense subject only to reasonable restrictions. it is against this precedent that the state court decision must be judged.

Respondents posit two explanations for the preclusion of Koral's testimony. First, they argue that if Koral had been permitted to testify, petitioner would have gained an unfair tactical advantage in that the jury would be able to conclude that petitioner relied on Koral's testimony without any evidence of petitioner's state of mind. This so-called tactical advantage could easily be prevented by a proper jury instruction. In *Bisno v. United States*, 299 F.2d 711, 720 (9th Cir. 1962),[6] the Ninth

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ally abridge the right of an accused to present a defense. 118 S.Ct. at 1263. This holding, however, was rooted in a desire to exclude unreliable evidence. Rule 707 was found to be a "rational and proportional means of advancing the legitimate interest in barring unreliable evidence," *id.* at 1266, because it did not implicate any significant interest of the accused—the accused was not prohibited from testifying in his own behalf, he was only precluded from offering opinion testimony from a polygraph expert to bolster his own credibility. *Id.* at 1268-69. The cases of *Taylor* and *Noble* are equally inapplicable. In *Taylor*, an Illinois trial judge refused to allow an undisclosed defense witness to testify as a sanction for failing to identify the witness in response to a pretrial discovery request. 484 U.S. at 401-02. The Supreme Court held that such a sanction is not absolutely prohibited by the Sixth Amendment's Compulsory Process Clause and found no constitutional error on the specific facts before it. *Id.* at 402. In *Nobles*, a state court judge precluded an investigator from offering impeachment testimony where the defense counsel refused to produce a written report prepared by that investigator. 422 U.S. at 229. The Court held that the preclusion sanction was an "entirely proper method of assuring compliance with [the state court] order" that did not violate the defendant's Sixth Amendment right to compulsory process. *Id.* at 241.

[6] Federal habeas courts are not precluded from "considering the decisions of inferior federal courts when evaluating whether the

Circuit found that when defendant's attorney testified but defendant did not, the record was silent as to whether he sought and followed, in good faith, the advice of counsel. Accordingly, although the attorney testified, a specific instruction on advice of counsel was denied. "Under the general instruction given by the district court on specific intent, *the jury was entitled to consider the testimony of [defendant's] counsel for what it was worth and no more.*" *Id.* (emphasis added). Respondents also justify the preclusion of Koral's testimony on the ground that it prevented confusion of the issues. However, respondents fail to identify either the issues that could be confused or the way in which such confusion could be prevented. This justification is, therefore, untenable.

None of the cases cited by the respondents bear any resemblance to this petition. Here, the state court judge excluded the testimony of a defense witness who sought to offer evidence on the issue of fraudulent intent. In *Rock,* the Court enunciated the key concern: the exclusion of evidence is arbitrary or disproportionate *only* where it infringes on a weighty interest of the accused. In *Scheffer*, for example, the Court found that it was perfectly acceptable to exclude polygraph evidence which it found to be inherently unreliable. In both *Taylor* and *Nobles*, the preclusion of witness testimony as a sanction for discovery abuse was not disproportionate or arbitrary.

The case here is quite different. Koral's testimony was not precluded because it was unreliable or as a sanction. Rather, it was precluded because the trial judge decided that the defendant was the only witness who was com-

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state court's application of the law was reasonable." *Matteo*, 171 F.3d at 890 ("in certain cases it may be appropriate to consider the decisions of inferior federal courts as helpful amplifications of Supreme Court precedent").

petent to offer testimony regarding his state of mind. In applying the standard set forth in *Rock* and *Scheffer*, this preclusion was both arbitrary and disproportionate in its impact on Lurie's very weighty interest in presenting a defense.

In short, the applicable Supreme Court precedent establishes a defendant's right to present a defense. *See Washington v. Texas*; *Chambers v. Mississippi*. This right is not absolute, but is subject to reasonable restrictions. See *Rock v. Arkansas*, *United States v. Scheffer*. Here, the state has offered no reasons for the restriction it imposed. Indeed, the preclusion must be viewed as arbitrary and disproportionate because it *unreasonably* infringed on defendant's weighty interest in presenting a defense. Thus, the state court's preclusion of Koral's testimony was an unreasonable restriction of a right clearly established by Supreme Court precedent (the right to present a defense subject only to legitimate, non-arbitrary interests). Because the state court's preclusion of the testimony in issue was an unreasonable application of federal law as determined by the Supreme Court, the requirements of section 2254(d)(1) are satisfied. The April 26 Opinion and Order is hereby reinstated in full.

Given the history of this case, I am also issuing a certificate of appealability as to all of the issues raised in the instant petition as they are all debatable among jurists of reason and could be resolved in a different manner. *See United States v. Youngblood*, 116 F.3d 1113, 1113-14 (5th Cir. 1997) ("district court did not sua sponte grant or deny a COA"); *United States ex rel. Ayala v. Washington*, 97 Civ. 2864, 1997 WL 627648, at *6 (N.D.Ill. Sept. 30, 1997) ("this court sua sponte issues a certificate of appealability"). The Clerk of the Court is directed to close this case.

SO ORDERED:

/s/ SHIRA A. SCHEINDLIN
Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
July 1, 1999

Appearances

For Petitioner:

Mark M. Baker, Esq.
Brafman, Gilbert & Ross, P.C.
767 Third Avenue, 26th floor
New York, New York 10017
(212) 750-7800

For Respondents:

Christine Duisin, Esq.
Assistant Attorney General
for the State of New York
120 Broadway
New York, New York 10271
(212) 416-8745